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IN THE

PREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1361

NATIONAL CAPITAL AIRLINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD

and

WASHINGTON AIRWAYS, INC.,

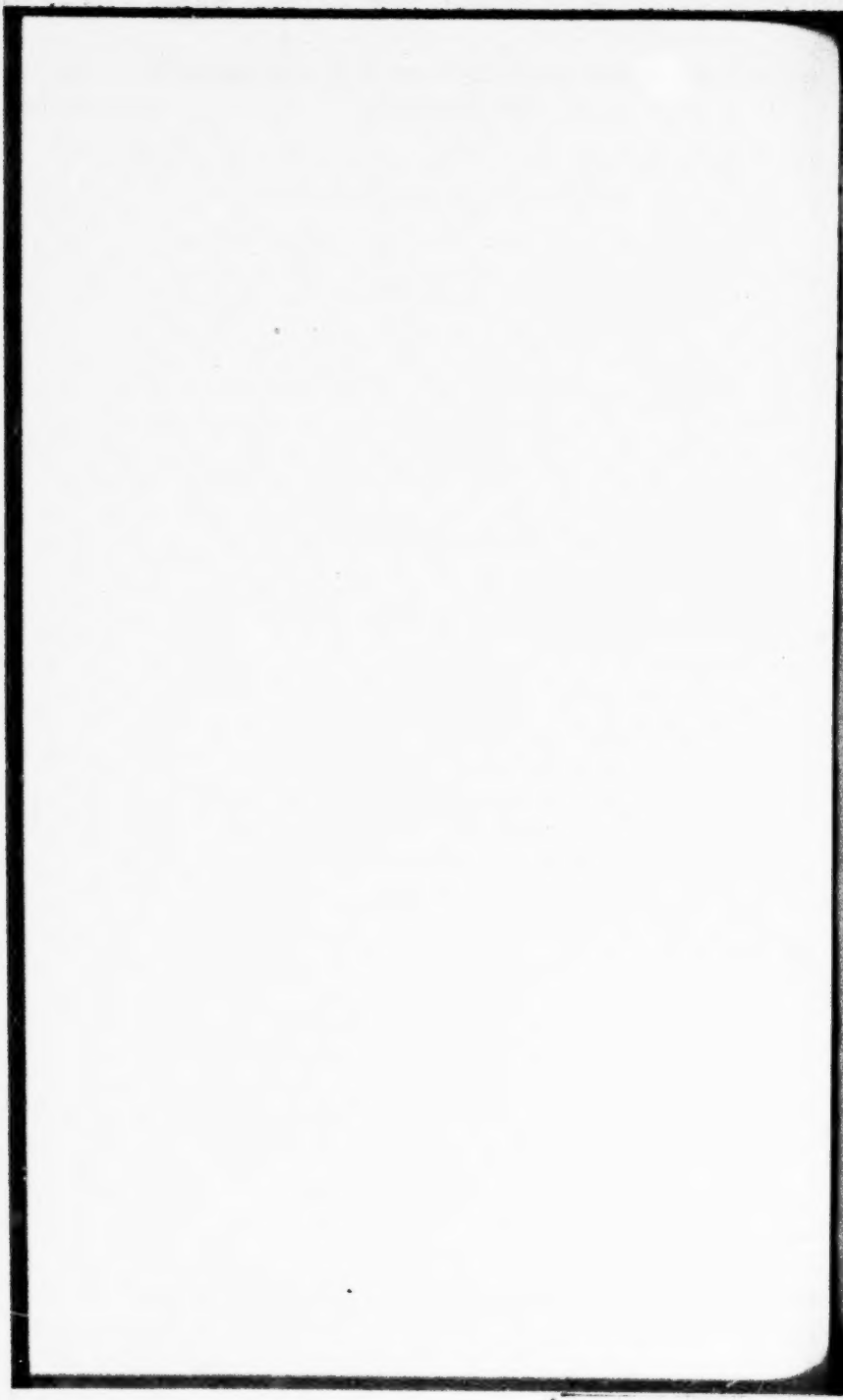
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NATIONAL CAPITAL AIRLINES, INC.,
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v.

CIVIL AERONAUTICS BOARD
and
WASHINGTON AIRWAYS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, National Capital Airlines, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 12, 1969.

OPINION BELOW

The opinion of the Court of Appeals, reported at 419 F.2d 668 (D.C. Cir. 1969), appears in the Appendix hereto (pp. C1-C18). The opinion of the Civil Aeronautics Board, not yet reported, also appears in the Appendix (pp. B1-B42).

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JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 12, 1969. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on October 28, 1969. A timely application for extension of time to and including March 27, 1970, in which to file this petition for writ of certiorari was granted by Order of the Chief Justice signed January 14, 1970 and this petition was filed within that time. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a Civil Aeronautics Board proceeding combining applications for approval of the consolidation or merger of property of competing air carriers under § 408 of the Federal Aviation Act, 49 U.S.C. 1378, and for certification as an air carrier under § 401 of that Act, 49 U.S.C. 1371, the Board may ignore the unequivocal antimonopoly prohibition of § 408(b) in favor of the broader "public convenience and necessity" standards of § 401.

2. Whether the antimonopoly provision of § 408(b) of the Federal Aviation Act, 49 U.S.C. 1378(b), prohibiting Civil Aeronautics Board approval of mergers or consolidations which "would result in creating a monopoly . . . and thereby restrain competition" permits both (a) Board approval of the formation of a consortium of eleven of the fourteen fixed wing air carriers serving the Baltimore-Washington area for the purpose of providing the sole certificated helicopter service in that area, when as many as four members of the consortium would individually otherwise have sought to provide such service, and (b) concurrent certification by the Board of that consortium for that purpose.

STATUTORY PROVISIONS INVOLVED

Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301 *et seq.* (1964 ed.):

¶¶ (a) and (b), § 408, 49 U.S.C. 1378(a), 1378(b) (1964 ed.):

"Section 408. Consolidation, merger, and acquisition of control.

(a) Prohibited acts.

It shall be unlawful unless approved by order of the Board as provided in this section–

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier; * * *"

The full text of § 408 appears in the Appendix hereto, at p. A-1-A-4 ¶¶ (a) and (d) § 401, 49 U.S.C. 1371(a), 1371(d) (1964 ed.)

"Section 401. Certificate of public convenience and necessity.

(a) Essentiality.

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * *

(d) Issuance.

(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such

transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied. * * *"

The full text of § 401 appears in the Appendix hereto, at pp. A-4-A-11.

STATEMENT OF THE CASE

Although in 1963 the Civil Aeronautics Board (Board) concluded that the public convenience and necessity did not require helicopter service subsidized by the Federal government in the Washington/Baltimore area,[1] three years later the Board ruled that the matter should be re-examined on a non-subsidized basis.[2] In its orders establishing an investigative proceeding on this subject, the Board invited applications and directed that all carriers serving the Washington/Baltimore area be made parties to the proceeding, so that it might consider arrangements for financial aid from one or more trunk lines for helicopter service in the area, should it decide that such service was required.[3] Within the time limit specified in the Board's order, eleven applications seeking certification as the sole helicopter carrier providing intercity, interairport, and city-to-airport service in the Washington/Baltimore area were filed, none by certificated fixed wing carriers. Among those applicants was petitioner, National Capital Airlines, Inc. (NCA).

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[1]Washington, D. C. Helicopter Service Case, 38 C.A.B. 823 (1963).

[2]Washington/Baltimore Helicopter Service Investigation, Docket 17665. The Board cited as justification for its changed view recent developments, including rapid growth of traffic, airport congestion, and privately negotiated support of helicopter services by trunk carriers in other areas.

[3]Order E-24133 (August 29, 1966), as amended by Order E-24548 (December 21, 1966). JA 17-19, 27-29.

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Subsequent to the holding of a prehearing conference in the proceeding and issuance of a prehearing report by the Examiner defining the issues and fixing the procedural dates, American Airlines, one of the fixed wing carriers serving the area, appeared for the first time and moved that the proceeding be delayed, that it be given an opportunity to form a consortium among other fixed wing carriers to apply for helicopter certification and, in the alternative, seeking allowance of its own petition for certification in the event it was unsuccessful in forming the consortium.[4] Three other fixed wing carriers serving the area indicated to the Board that if the consortium were not formed, each would probably seek the certificate for itself.[5]

Despite vigorous opposition by the parties, the Board allowed American's motion and, following another extension to enable further negotiations,[6] allowed the filing of a late application by a consortium named Washington Airways, Inc. (WAI), consisting of eleven of the fourteen fixed wing carriers serving the Washington/Baltimore area.[7] Upon inclusion of the consortium within the investigative pro-

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[4]JA 39-49. (Referenced to Joint Appendix in Record of proceedings before U. S. Court of Appeals for the District of Columbia Circuit.)

[5]JA 56, 69, 76.

[6]JA 91-92.

[7]Order E-25445 (July 24, 1967), JA 147-49. Although it is not presented as an issue in this case, it is interesting to note that permission was neither sought nor granted under § 412 of the Federal Aviation Act of 1958, 49 U.S.C. 1382, for the would-be members of the consortium to meet, consult, negotiate or agree on a noncompetitive course of action until fifteen days after the consortium's application was filed with the Board, at which time a belated memorandum of agreement was filed with the Board.

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ceeding, two independent applicants withdrew, one of which specifically cited the formation of the consortium as the reason for its withdrawal. The four fixed wing carriers who had intended to file applications if the consortium were not formed (American, Eastern, Trans World and Allegheny) did not file competing applications.[8] Instead, all four joined the consortium.

After additional postponements granted to the consortium to permit it to organize itself and prepare its case, the Board commenced hearings on October 2, 1967, thirteen months after the issuance of the Board's original order commencing the proceeding. The U. S. Department of Justice intervened to express its concern over the antitrust policy implications of WAI's formation and application. After extensive hearings, the Hearing Examiner issued an initial decision on May 8, 1968, recommending against certification of any service and recommending that the applications of all parties be dismissed. Thereafter the Board took discretionary review of the case.[9] Although WAI did not oppose or except to the Examiner's decision, the Board's final order reversed the Examiner, found a public need for the service and awarded the certificate to the airline consortium. At the same time it approved under § 408 of the Act (49 U.S.C. 1378) the formation of the consortium and its operation under a certificate by other carriers.[10] In its accompanying opinion, the Board made no factual finding with respect to the antitrust prohibition of § 408, *i.e.*, as to the facts that would determine the existence *vel non* of monopoly, restraint of competition, or jeopardy to other carriers, although these issues had been squarely raised by the Department of Justice, as well as by the parties. Instead, the Board, after stating that conditions placed

[8]JA 150, 151.

[9]Order E-26815 (May 21, 1968). JA 414.

[10]Order 68-11-71 (November 18, 1968). JA 480-81.

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in its order would safeguard against the "risk of anticompetitive consequences,"[11] and reciting (and misstating) the conflicting conclusory positions of the parties with respect to these consequences, found merely that the agreement establishing the consortium should be approved and would not violate the Act.

Review of the Board's final decision was obtained in the United States Court of Appeals for the District of Columbia Circuit under the provisions of § 1006 of the Federal Aviation Act of 1958, 49 U.S.C. 1486 (1964 ed.). The Court of Appeals found that although "monopoly" as prohibited by § 408(b) of the Act would clearly result from the Board's order, it would follow from the § 401 (certification) portion of the order, not from the § 408 (approving formation of the consortium) portion of the order, and therefore the absolute prohibition of § 408 could properly be ignored by the Board so long as it found under § 401 that the public interest advantages outweighed the anticompetitive effects. Since, the Court below reasoned, the grant of every certificate to one applicant under § 401 of the Act will result in a monopoly, this case is no different from any other such proceeding and, therefore, the Board was justified in concluding that any anticompetitive effects were insubstantial, speculative and outweighed by the advantages to be gained.[12]

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[11] JA 466. The only conditions imposed are (1) that the consortium hold open its membership roster for twelve months so that any would-be independent competitor could join the monopoly if it so desired, and (2) that the Board would maintain its vigilance over the consortium and the antimonopoly requirements of the Act, as already required by Congress. JA 471, 480.

[12] 419 F.2d 668 at 677; Appendix, *infra*, pp. C-14-C-15.

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REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant and Recurring Problems Concerning the Interpretation and Administration of the Federal Aviation Act.

Although the Federal Aviation Act of 1958 and its predecessor, the Civil Aeronautics Act of 1938, have for nearly 32 years contained a rigid antimonopoly prohibition against approval of mergers, consolidations, purchases, acquisitions, leases, etc., which would result in a monopoly restraining competition, this Court has never had occasion to construe this provision or to give the Board any guidance with respect to measuring its impact or scope.[13] Further, counsel have found only three other Court of Appeals cases interpreting this antimonopoly prohibition, all of which take a completely different approach from the case at bar (see point 3, *infra*). *National Aviation Trades Ass'n. v. C.A.B.*, No. 22,602 (D.C. Cir., decided October 2, 1969); *Butler Aviation Co. v. C.A.B.*, 389 F.2d 517 (2d Cir. 1968); *Northwest Airlines, Inc. v. C.A.B.*, 303 F.2d 395 (D.C. Cir. 1962).

This dearth of judicial review is traceable principally to the diverse and extensive structure of the air transportation industry in its early and maturing years. Early coalescences, mergers, combinations, and acquisitions for the most part posed few problems having an economic impact sufficiently grave to warrant the expense and delay involved in seeking judicial review. Consequently, many of the few true con-

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[13] This Court's decision in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), concerned itself with whether this section is applicable to an acquisition that predated the Act and whether, if so, this precluded a Court-originated antitrust action.

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troversies that arose as a result of the Board's early zealousness in protecting traditional antitrust policies were settled or dropped without Court review.[14]

Today the situation is different. There are fewer carriers and much greater investments are required.[15] The expense of operating a viable air transportation service or of risking success or failure in the industry has become so great that more and more questions within the ambit of § 408 are certain to arise.[16] As the costs of providing air transportation services rise, mergers and combinations are inevitable. Already two of the major trunk lines are negotiating a major merger.[16a] What criteria are to guide the Board in ruling upon these proposals? What weight is to be given to the absolute, unequivocal prohibition by Congress against competition-restraining monopoly? This Court should now take this opportunity to lay down guidelines before Board errors even more serious than this one begin to permeate the industry in circumstances wherein certiorari is not sought for one reason or another.

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[14]See, for example, *Volumair Agreement*, 30 C.A.B. 1007, 1009 (1960); *Local Cartage Agreement Case*, 15 C.A.B. 850, 852-853 (1952); *Air Freight Tariff Agreement Case*, 14 C.A.B. 424, 425 (1951); *American Airlines, Control of Mid-Continent Airlines*, 7 C.A.B. 365, 378 (1945).

[15]In 1959 there were 57 certificated carriers in the United States; in 1968, there were 50. In 1959 total capital invested in the industry was $1,920,560,000; in 1968 the figure was $6,752,304,000. *C.A.B. Annual Report*, 1969, pp. 80, 82.

[16]Investment in flight equipment, for example, has gone from $1,403,674,000 in 1959 to $6,475,386,000 in 1968. *Ibid.* The cost of a new superjet is about $23 million each, 26 of which have already been ordered by American companies. *Time*, January 19, 1970, p. 52.

[16a]See *Northeast-Northwest Merger Agreement*, C.A.B. Docket 21819.

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In this connection it is well to consider the importance which Congress ascribed to the antitrust prohibition now appearing in § 408(b) when it was originally enacted as part of the Civil Aeronautics Act of 1938. Lengthy debate took place on this language in the Senate, underlining that body's concern lest the Board's authority now contained in § 408 would permit the establishment of monopolies.[17] Indeed, to guard against this possibility, the proposed Act was amended by the Senate to remove the words "unduly" before "restrain competition" and "unreasonably" before "jeopardize another air carrier."

Beyond the bare question of statutory construction, the decisions of the Court and Board below represent, as the Board itself recognized, "a departure from [the Board's] traditional selection of an independent operator to provide a proposed service" (App. B-30). The effect of the Board's decision if left standing would be to open up the tremendously expanding and economically promising area of short-haul helicopter service to the domination of existing fixed wing trunk carriers. Anyone who travels by air today recognizes that the major problems of the future lie in improving the home-to-airport segment of air travel. It is this segment which the Board and the Court below have by these decisions laid bare to domination by the long-haul carriers. If this has been done, as petitioner contends, erroneously and in conflict with the reasoning of previous Supreme Court and Court of Appeals cases, this Court should so indicate now before damage to the economy of the industry becomes irreparable.

2. The Decision Below Is Inconsistent with the Reasoning of This Court in Other Antitrust Cases.

The Court below concedes that approval by the Board of the formation of the consortium under § 408, together with its certification under § 401, created a "monopoly." 419 F.2d at 677 (App., *infra*, C-14–C-15). Indeed, it would

[17] 83 Cong. Rec. 6728-32 (1938).

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be difficult to conceive how it could be contended that a consortium of eleven of the fourteen fixed wing carriers serving the Washington/Baltimore area, which included the four largest domestic trunk line carriers and the two largest international air carriers, could be found to be otherwise.

It follows then, the Board having approved a consolidation or merger that created a monopoly, it clearly did so contrary to § 408 if that monopoly restrained competition. This Court has laid down specific guidelines applicable to the facts in this case that require a finding that such a monopoly would restrain competition. In *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967) (the "Clorox" case), this Court said the following:

> ". . . The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future . . . The section can deal only with probabilities, not with certainties. . . ." 386 U.S. at 577.
>
> * * *
>
> ". . . the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm." 386 U.S. at 578.
>
> * * *
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> ". . . The Court of Appeals declared that this finding was not supported by evidence because there was no evidence that Procter's management had ever intended to enter the industry independently and that Procter had never attempted to enter. The evidence, however, clearly shows that Procter was the most likely entrant. . . ." 386 U.S. at 580.

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Applying these rulings to the facts at bar, there can be no question that one of the merging companies, indeed, the moving force behind the merger, American Airlines, was not only "the most likely entrant" but had positively stated that, if the consortium were not formed, it would seek certification itself. Moreover, it can hardly be gainsaid that formation of the powerful consortium would raise entry barriers and dissuade smaller firms from aggressively competing. Indeed, once more, the record shows exactly that. Two smaller independent applicants for the helicopter certificate withdrew from the proceeding upon inclusion of the consortium in the case.[18]

Again, this Court stated in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964):

> ". . . Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. . . ." 378 U.S. at 168.
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> * * *
>
> ". . . Certainly the sole test would not be the probability that *both* companies would have entered the market. Nor would the consideration be limited to the probability that one entered alone. There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market. . . ." 378 U.S. at 173.

[18]JA 150, 151.

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Application of these principles is equally clear to the facts at bar. American, Eastern, Trans World and Allegheny, who would likely have competed for certification at least, and would have stood at the threshold threatening entry if they had not gotten the certificate either through uncertificated service or through a later filed certificate application, all are now joined in the consortium—not to compete at all. Thus, if this Court's rulings in other antitrust cases with respect to the meaning of restraint of competition are to have any application to § 408 of the Federal Aviation Act, it is clear that the decision below was erroneous. Only this Court can now say whether the language of § 408 is to have the usual meaning or some warped significance unrelated to this Court's other rulings.

3. The Decision Below is Inconsistent with the Rationale Underlying Other Court of Appeals Cases Interpreting Section 408.

The decision below holds that the Board was justified in ignoring the § 408 antitrust prohibition and indicates that no finding with respect to the existence of a monopoly that restrains competition is necessary, at least in this kind of case where § 408 approval of a merger is sought along with § 401 issuance of a certificate. The Court below reasons that the issuance of a certificate to any one applicant always creates a monopoly; consequently, the Board is justified in considering only the relative merits and disadvantages in the public interest of the overall anticompetitive effects of its actions without concern for the existence of a monopoly whether or not it restrains competition. This conclusion is in direct conflict with the only other Court of Appeals decisions counsel for petitioner can find interpreting § 408(b).

Three other Court of Appeals cases have considered the Board's application of § 408 to a potential monopoly. *National Aviation Trades Ass'n. v. C.A.B.*, No. 22,602 (D.C. Cir., decided October 2, 1969); *Butler Aviation Co. v. C.A.B.*, 389 F.2d 517 (2d Cir. 1968); *Northwest Airlines, Inc.*

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v. C.A.B., 303 F.2d 395 (D.C. Cir. 1962). All three of these cases held that, in applying the antimonopoly provision of § 408(b), the Board must consider the facts of each situation and make findings to determine whether or not a monopoly is created that would restrain competition. Following that determination, but only after such a determination was made, could the Board then proceed to adjudge whether the public interest advantages to be gained by granting the application would be outweighed by the other, lesser anticompetitive results. In each of these three cases a strict statutory constructionist writing for the Court set forth a two-level examination of the competitive aspects of the facts involved.

Thus, in *National Aviation Trades Ass'n. v. C.A.B., supra,* Judge Tamm, writing for another division of the Court of Appeals for the District of Columbia Circuit, wrote:

> ". . . [I]t seems clear that the Board's investigation into antitrust considerations must take place on two levels. The first branch of the inquiry is outlined by the proviso concerning monopolies quoted above. In *Butler Aviation Co. v. C.A.B.*, 389 F.2d 517, 519 (2d Cir. 1968), it was pointed out that this proviso is not applicable unless the Board finds both that the agreement will create a monopoly and that the monopoly will either restrain competition or jeopardize a non-party carrier.
>
> "Once the Board finds that the monopoly proviso is inapplicable, however, it must then embark upon the second branch of the antitrust inquiry which encompasses anticompetitive effects less drastic than monopolization. This duty arises from the explanation of the 'public interest' standard set forth in section 102(d) of the Act, 49 U.S.C. § 1302(d) (1964), and presumably from the inclusion of this same term in section 408. . . ." Slip op. at p. 6.

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In the case upon which Judge Tamm relied, *Butler Aviation Co. v. C.A.B., supra,* Judge Friendly, speaking for the Court of Appeals for the Second Circuit, wrote:

> ". . . Restraint of competition or jeopardy to another air carrier is not enough to trigger the proviso unless brought about by the creation of a monopoly; *per contra* the creation of a monopoly is not enough unless it would restrain competition or jeopardize a non-party air carrier. . . . The true construction of § 408(b) as to transactions with anticompetitive effects thus is that the Board cannot approve a transaction if its effects will be so extreme as to violate the proviso but must approve others if, but only if, it finds the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.'. . ." 389 F.2d at 519.

Finally, in *Northwest Airlines, Inc. v. C.A.B., supra,* Judge Prettyman, again writing for the Court of Appeals for the District of Columbia Circuit, said of the antitrust prohibition:

> ". . . This proviso is that 'the Board shall not approve any consolidation, merger, purchase, lease, operating contract or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control.' The proviso was clearly aimed, in both language and intendment, at mergers which would *create* monopoly. The merger in the matter at bar did not create or tend to create monopoly. . . ." 303 F.2d at 401.

Thus, in each of these three cases the Court considered separately the question of whether or not approval under

§ 408 would create a monopoly and restrain competition. By contrast, Judge Robb in the decision below stated:

> ". . . There is no doubt that Washington Airways, as the only carrier authorized by the Board to provide the proposed helicopter service, has a monopoly. The difficulty with petitioner's argument is that the monopoly results not from the Board's approval under Sec. 408 of the ownership and control of Washington Airways by the carriers, but rather from the certification by the Board pursuant to Sec. 401. Such a monopoly will always result when the Board certificates only one carrier to serve a given market. The result would have been the same had the Board chosen National Capital instead of Washington Airways. Here there was no suggestion by anyone that the Board should certificate more than one carrier; on the contrary it was agreed by all that the Board would choose one applicant as best qualified, to the exclusion of the others. In these circumstances the Board was justified in concluding that any anti-competitive effects resulting from the control of Washington Airways by the carriers were insubstantial and speculative, and were outweighed by the advantages to be gained. . . ." 419 F.2d at 677, App., *infra*, pp. C-14-C-15.

Thus, for the first time, a Court of Appeals has ruled that § 408 does not require a determination by the Board as to whether its approval would create a monopoly and thereby restrain competition, at least where such approval is sought in conjunction with a § 401 application for a certificate. Are the other Courts wrong? Or is it so simple to avoid the prohibition of § 408 that one need only couple a § 408 application with a § 401 prayer? Only this Court can now clarify these important questions regarding the interpretation and administration of the Federal Aviation Act.

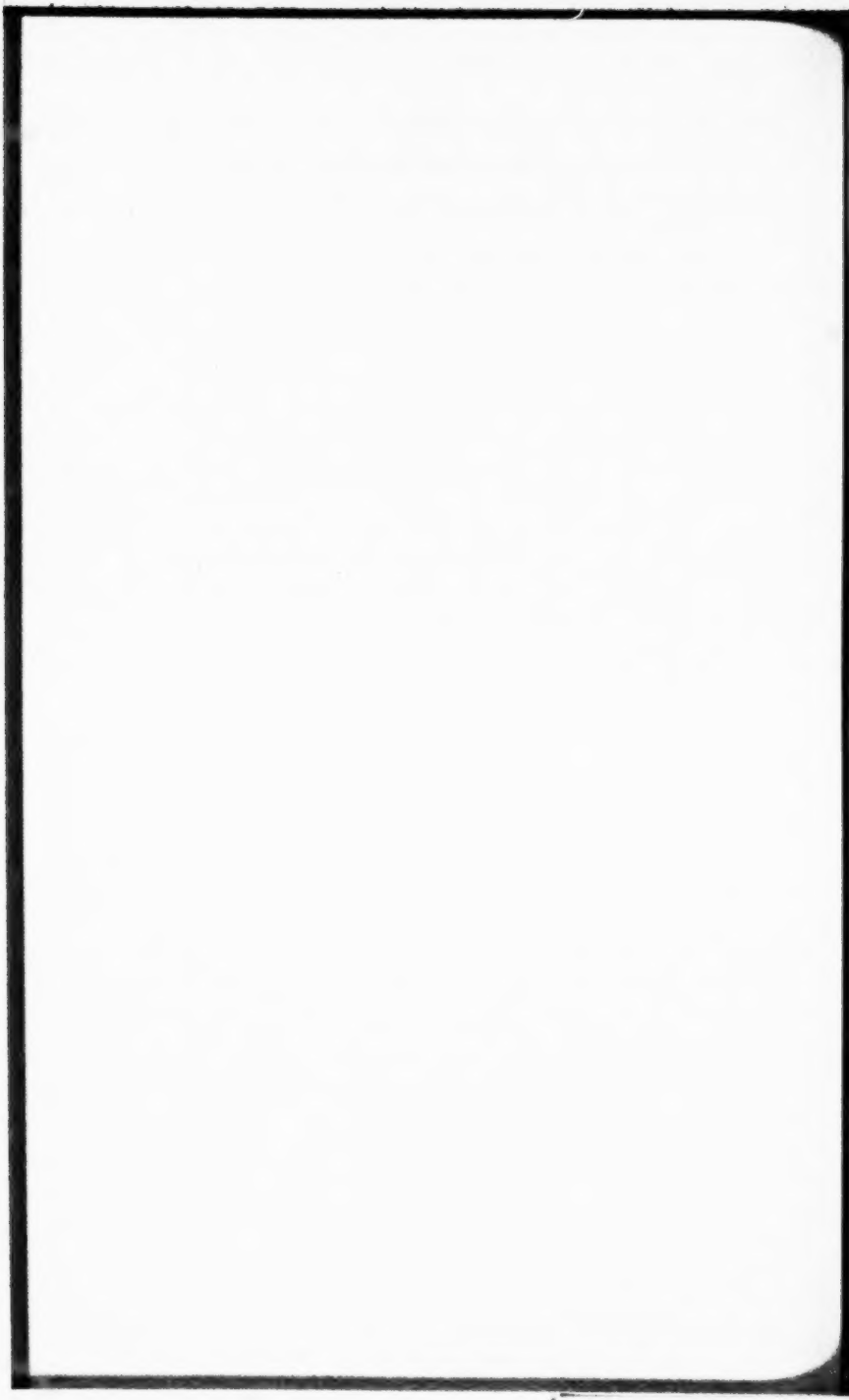
CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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March 27, 1970



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APPENDIX A

STATUTES INVOLVED

SECTION 408

Consolidation, merger, and acquisition of control.

(a) Prohibited acts.

It shall be unlawful unless approved by order of the Board as provided in this section–

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier.

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever.

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

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(b) Application to Board; hearing; approval; disposal without hearing.

Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transpor-

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tation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

(c) Interests in ground facilities.

The provisions of this section and section 1379 of this title shall not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

(d) Jurisdiction of accounts of noncarriers.

Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

(e) Investigation of violations.

The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision

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of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision.

SECTION 401

Certificate of public convenience and necessity.

(a) Essentiality.

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

(b) Application.

Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Notice of application; filing of protest or memorandum; hearing.

Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) Issuance.

(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that

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such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

(3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this chapter.

(e) Terms, conditions, and limitations.

(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

(2) A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only

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the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States.

(3) A certificate issued under this section to engage in supplemental air transportation shall designate the terminal and intermediate points only insofar as the Board shall deem practicable and otherwise shall designate only the geographical area or areas within or between which service may be rendered.

(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d) (3) of this section.

(5) No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate.

(6) Any air carrier, other than a supplemental air carrier, may perform charter trips or any other special service, without regard to the points named in its certificate, or the type of service provided therein, under regulations prescribed by the Board.

(f) Effective date and duration.

Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration

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thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(g) Alteration, amendment, modification, suspension, or revocation.

The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

(h) Transfer.

No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.

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(i) Rights in the use of airspace, airways, landing areas, or air-navigation facilities.

No certificate shall confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, landing area, or air-navigation facility.

(j) Abandonment of routes.

No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

(k) Compliance with labor legislation.

(1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and co-pilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with decision numbered 83 made by the National Labor Board on May 10, 1934, notwithstanding any limitation therein as to the period of its effectiveness.

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

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(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181–188 of Title 45.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including takeoff and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot or copilot.

(l) Carriage of mail.

Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

(m) Application for new mail service.

Whenever, from time to time, the Postmaster General shall find that the needs of the Postal Service require the transportation of mail by aircraft between any points within the United States or between the United States and foreign countries, in addition to the transportation of mail authorized in certificates then currently effective, the Postmaster General shall certify such finding to the Board and file therewith a statement showing such additional service and the facilities necessary in connection therewith, and a copy of such certification and statement shall be posted for at least twenty days in the office of the secretary of the Board. The Board shall, after notice and hearing, and if found by it to be required by the public convenience and necessity, make provision for such additional service, and the facilities necessary in connection therewith, by issuing a new certificate or certificates or by amending an existing

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certificate or certificates in accordance with the provisions of this section.

(n) Additional powers and duties of Board with respect to supplemental air carriers.

(1) No certificate to engage in supplemental air transportation, and no special operating authorization described in section 1387 of this title, shall be issued or remain in effect unless the applicant for such certificate or the supplemental air carrier, as the case may be, complies with regulations or orders issued by the Board governing the filing and approval of policies of insurance, in the amount prescribed by the Board, conditioned to pay, within the amount of such insurance, amounts for which such applicant or such supplemental air carrier may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the negligent operation or maintenance of aircraft under such certificate or such special operating authorization.

(2) In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

(3) If any service authorized by a certificate to engage in supplemental air transportation is not performed to the minimum extent prescribed by the Board, it may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(4) The requirement that each applicant for a certificate to engage in supplemental air transportation must be found to be fit, willingly, and able properly to perform the transportation covered by his application and to conform to the

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provisions of this chapter and the rules, regulations, and requirements of the Board under this chapter shall be a continuing requirement applicable to each supplemental air carrier with respect to the transportation authorized by, and currently furnished or proposed to be furnished under, such carrier's certificate. The Board shall by order, entered after notice and hearing, modify, suspend, or revoke such certificate, in whole or in part, for failure of such carrier (A) to comply with the continuing requirement that such carrier be so fit, willing, and able or (B) to file such reports as the Board may deem necessary to determine whether such carrier is so fit, willing, and able.

(5) In any case in which the Board determines that the failure of a supplemental air carrier to comply with the provisions of paragraph (1), (3), or (4) of this subsection, or regulations or orders of the Board thereunder, requires, in the interest of the rights, welfare, or safety of the public, immediate suspension of such carrier's certificate, the Board shall suspend such certificate, in whole or in part, without notice or hearing, for not more than thirty days. The Board shall immediately enter upon a hearing to determine whether such certificate should be modified, suspended, or revoked and, pending the completion of such hearing, the Board may further suspend such certificate for additional periods aggregating not more than sixty days. If the Board determines that a carrier whose certificate is suspended under this paragraph comes into compliance with the provisions of paragraphs (1), (3), and (4) of this subsection, and regulations and orders of the Board thereunder, the Board may immediately terminate the suspension of such certificate and any pending proceeding commenced under this paragraph, but nothing in this sentence shall preclude the Board from imposing on such carrier a civil penalty for any violation of such provisions, regulations, or orders.

(6) The Board shall prescribe such regulations and issue such orders as may be necessary to carry out the provisions of this subsection.

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APPENDIX B
UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

[Served Nov. 21, 1968]

DOCKET 17665

WASHINGTON/BALTIMORE HELICOPTER SERVICE INVESTIGATION

Decided: November 18, 1968

Temporary certificate of public convenience and necessity for route 160 issued to Washington Airways, Inc., authorizing the transportation of persons, property, and mail on a subsidy-ineligible basis for a period of five years between Dulles International Airport, the intermediate points Washington, D.C., Friendship International Airport, and the terminal point downtown Baltimore, Md.

Area exemption authorizing the transportation of persons, property, and mail between any points within the metropolitan area of each city (as defined by a radius of approximately ten miles from the downtown city centers of Washington and Baltimore), on the one hand, and each of the three airports serving the Washington/Baltimore area, on the other hand, granted to WAI to afford the carrier necessary flexibility in modifying or expanding its pattern of service in response to the changing needs of the Postal Service and the traveling public. Exemption to be limited to a five-year period, coextensive with the term of the temporary certificate issued herein.

Applications of National Capital Airlines, Washington-Baltimore Helicopter Airways, New York Airways, and Hutter Ports for the authority at issue herein denied.

Part 298 of the Board's Economic Regulations to be amended by adding an exception to the limitations contained in subsections 298.21(b)(2) and (d) barring competition be-

tween air taxis and any certificated, scheduled helicopter passenger service, in order to permit the operation of inter-airport air taxi services in the Washington/Baltimore area.

Agreement creating various control and interlocking relationships involved in the organizational structure of WAI approved under sections 408, 409, and 412 of the Act, subject to conditions and the retention of Board jurisdiction for the purpose of taking further action as necessary.

Application of San Francisco and Oakland Helicopter Airlines and M. F. Bagan in Docket 17761 seeking approval of certain control and interlocking relationships between the applicants and National Capital Airlines dismissed as moot.

APPEARANCES:

Same as in the examiner's initial decision.

OPINION

BY THE BOARD:

This proceeding involves an investigation instituted by the Board to determine the need for and feasibility of scheduled helicopter service to be conducted on a subsidy-ineligible basis between points within the metropolitan areas of Washington and Baltimore and the three airports serving this area, Dulles, National, and Friendship, and between each of the three airports; and to determine which of the applicants, if any, should be selected to provide the authorized service.[1]

After due notice, a public hearing was held before Examiner William J. Madden, who thereafter issued his initial decision in which he concluded that the public convenience and necessity do not require the authorization of scheduled helicopter service in the Washington/Baltimore area at the present time. In so concluding, he found, essentially, that no real or urgent need for a helicopter service currently exists, and that the operation of a reasonable pattern of

[1] Order E-24133, August 29, 1966, as amended by Order E-24548, December 21, 1966.

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service by any of the applicants herein would entail substantial operating deficits requiring some form of assistance payments at a high level for an indefinite period of time. In such circumstances, the examiner viewed the proposed service as a "luxury" service for relatively few users which would not justify the level of financial assistance required, regardless of the source of such support. Finally, he concluded that there is no basis for expecting the early availability of "next-generation" helicopter aircraft, and that existing helicopter services in other areas are adequate to permit continuation of the experimental and developmental objectives found desirable in earlier proceedings.

Following the initial decision, exceptions and briefs were filed pursuant to Order E-26815, May 20, 1968, by which the Board exercised its right of review without awaiting the filing of petitions.[2] Oral argument having been heard, the case now stands submitted for decision.

Upon consideration of the entire record we have decided that, contrary to the examiner's determination, a scheduled helicopter service should be certificated on a five-year temporary basis in the Washington/Baltimore area. Except as modified herein, we adopt the examiner's initial decision, which is attached hereto as an Appendix.

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[2]Exceptions to the initial decision were filed by National Capital Airlines (NCA), Washington-Baltimore Helicopter Airways (WBHA), New York Airways (NYA), Hutter Ports (Hutter), and the Metropolitan Washington Board of Trade. Briefs to the Board, or letters adopting the brief to the examiner as brief to the Board, have been submitted by NCA, WBHA, NYA, Washington Airways, Inc. (WAI), the Bureau of Operating Rights (Bureau), the Department of Transportation (DOT), the Board of Trade, and Baltimore and the State Aviation Commission of Maryland (Baltimore parties).

NYA's exceptions were filed late, and were accompanied by a motion for leave to file. WBHA and NCA have filed motions and an answer requesting that the Board deny NYA's motion, and that it strike the briefs of both NYA and WAI (the latter for failing to file any exceptions). Action on these requests was deferred in part by Order 68-7-105, July 22, 1968, pending conclusion of oral argument.

[continued]

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1. Several factors lead us to conclude that the public convenience and necessity require authorization of the service at issue in this proceeding. While we find it unnecessary to attempt to make a precise finding as to the amount of traffic which a new helicopter service in this area will generate in the first year of operations, our consideration of the applicants' forecasts and other evidence, discussed below, leads us to conclude that a substantial volume of first-year traffic will be available to and benefited by a helicopter service, that substantial increases in traffic in ensuing years may be reasonably anticipated,[3] and that such service will substantially assist in providing the overall pattern of airline service required to meet the needs of the Washington/Baltimore area.

First, we note that all parties anticipate that the new service will be able to attract a substantial volume of traffic, even in the first year of operations. Each of the applicants has forecast first-year traffic in excess of 250,000 passengers[4]

We will deny the motion to strike WAI's brief since we find that WAI has supported the examiner's ultimate conclusion on brief, and since we agree that it would be unreasonable to deprive WAI of an opportunity to urge, in the alternative, the merits of its own application in the event that the Board should determine to reverse the examiner's decision on the issue of need for the proposed service. We also conclude that no party has been materially prejudiced by receipt of NYA's exceptions and, sufficient cause for such late filing have been shown, we have determined to grant NYA's motion to permit it to adopt its brief to the examiner as its brief to the Board for consideration herein.

[3]The details of the various traffic forecasts are set forth in portions of the examiner's decision appended hereto.

[4]The applicants' forecasts, which ranged from 252,400 to 281,125, were criticized by the examiner as "lacking assurance" in view of the wide disparities in individual market forecasts which the total represented. We note, however, that the highest forecast was submitted by NCA, whom the examiner found had employed the most detailed and sophisticated forecasting technique, while the lowest forecast was that of NYA, which proposed to serve only two of the ten markets in issue.

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and, although the various forecasts are based upon different service and other assumptions, this amount of helicopter traffic measured against an anticipated 1968 total area volume of 15.6 million air passengers is equivalent to a penetration of 1.6 percent—a figure which may be regarded as conservative in comparison with the penetration achieved by helicopter service in other areas.[5]

In addition, a combination of geographical and economic characteristics of the Washington/Baltimore area (see appendix, *infra*) tend to reinforce the view that this area has need for and may be expected to provide substantial traffic support to a scheduled helicopter operation, notwithstanding the existence of lower-priced competitive modes of transportation. In particular, Washington's unique importance as the seat of government and as the center of a rapidly expanding research and development industry assures travel to this area by a substantial volume of time-conscious, price-insensitive business and professional travelers, together with a steadily increasing volume of tourist visitation. In light of this, the remoteness of the two outlying airports serving Washington in terms of the time involved in surface travel via existing modes, particularly during the morning and evening commuter rush hours when a large part of busi-

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[5] "Penetration," *i.e.*, the extent to which a new service is able to participate in the total traffic presently moving via competitive transportation alternatives, is one yardstick by which the traffic potential of a new helicopter service may be forecast, through comparison with the penetration factors achieved by established helicopter services in other areas. While admittedly an imprecise statistical tool, due to the impact of such other factors as number and types of markets, stage lengths, underlying terrain, price, and quality of alternative modes, the use of known penetration factors has validity in establishing a "zone of reasonableness" for forecasts of anticipated future traffic in comparable markets.

The degrees of penetration achieved by existing scheduled helicopter operations in New York, San Francisco, and Los Angeles, ranged from 2.26 to 3.0 percent during fiscal year 1966. (WBHA Exhibits 313 through 317.)

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ness and professional travel takes place,[6] suggests that a substantial pool of traffic for helicopter service in this area exists at the present time. On the basis of the foregoing, we find that the market for the new helicopter service initially approximates 250,000 passengers per year.[7]

We also are cognizant that, without further action on our part, our certification of scheduled helicopter passenger service in the Washington/Baltimore area would, under the terms of Part 298 of the Economic Regulations, operate to preclude existing and proposed air taxi operations involving regular inter-airport service in this area.[8] In this connection,

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[6]For example, Dulles and Friendship airports, which are situated 31 and 32 miles from downtown Washington, respectively, require a 45-to 60-minute ride by surface transportation during the hours of peak surface congestion, as opposed to 15-and 18-minute trips by helicopter, respectively, in each of these markets. Moreover, several of the applicants have noted that a helicopter passenger will be able to avoid the additional 30-minute check-in time urged by the fixed-wing carriers for travelers arriving at these airports via surface modes.

[7]Although the examiner did not make a finding as to the probable volume of traffic which would be generated by a helicopter service, he characterized the proposed service as a "luxury service for a relatively few users . . . [which] will not justify the financial assistance that would be necessary, regardless of the source of the assistance." (I.D. p. 73.) We disagree and note that the Board has expressly sanctioned support arrangements in the case of other unprofitable helicopter operations. In Order E-23714, May 20, 1966, in which the Board renewed the certificate of New York Airways for an indefinite period on a subsidy-ineligible basis, we gave our approval to certain support agreements between NYA and Pan American and Trans World Airlines, stating: "In sum, we believe that NYA's service should be supported by the users, by the trunklines that benefit from the feeder type operations provided, and by the community and institutions which it primarily serves, and not by the taxpayers." (Pp. 3-4.)

[8]§ 298.21(b) *General limitations.* An air taxi operator is prohibited from providing air transportation, or holding out to the public expressly or by course of conduct, that it provides such transportation regularly or with a reasonable degree of regularity . . . (2) between any points where scheduled helicopter passenger service, or

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we note that the applicants' forecasts appear to take into account the existence of the presently available scheduled operations of the certificated air carriers between the airports involved, and presumably also of air taxi service available on demand. They do not, however, appear to take into account the possibility of scheduled air taxie services between such airports, and their traffic forecasts disclose that they anticipate that a sizeable amount of the available traffic consists of airport-to-airport passengers.[9] We assume that such traffic may approximate 50 percent of the total traffic upon which they rely, and further assume that a scheduled taxi service would attract some portion of the total market which will be available to the helicopter operator and the other certificated carriers. Notwithstanding the initial significance of inter-airport traffic to the operations here in issue, however, we propose to continue in force the blanket exemption authorization for inter-airport air taxi operations in the Washington-Baltimore area and are issuing simultaneously herewith a notice of proposed rule-making which will make inapplicable the existing provisions of section 298.21(b)(2) and (d) to the area involved.

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community center and inter-airport service, is provided by the holder of a certificate of public convenience and necessity either in accordance with such certificate or pursuant to exemption order of the Board. (d) *Special limitation.* No service by helicopter, STOL or VTOL aircraft shall be offered or performed by an air taxi operator between any two points between which scheduled helicopter, STOL or VTOL aircraft service is provided by the holder of a certificate of public convenience and necessity authorizing such service.

[9] In the first year of operations, NCA forecast 118,339 inter-airport passengers, amounting to 42 percent of its total forecast of 281,125 passengers. WBHA forecast 129,000 inter-airport passengers, representing 49 percent of a total forecast movement of 262,000. WAI's forecast of 207,900 inter-airport passengers amounts to 79 percent of a total anticipated movement of 264,000 passengers. NYA did not propose or forecast inter-airport service.

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Those provisions were initially imposed largely because the earlier certificated helicopter operators were subsidized by the government, a situation which does not exist with respect to the application which we are granting. We are reluctant to require existing air taxi operators to discontinue or curtail their activities because of the temporary certification of an experimental helicopter service. Moreover, we believe that the greatest utility and feasibility for helicopter service in this area in the long run lies in transportation of passengers between various metropolitan and suburban areas and the three area airports, locations which at the moment can be served only by helicopter. While we recognize that our action will result in the diversion from the operator which we are certificating of a portion of its anticipated traffic, we do not believe that air taxi competition will diminish the ultimate prospects for success of scheduled helicopter service.[10]

Recent developments with respect to the level of operations at National Airport, and the overall increase of airline traffic in the Washington/Baltimore area at a projected rate of 16 percent per year between 1966 and 1968, greatly enhances the need for and prospects of ultimate economically viable helicopter operations in this area. In the order of investigation in this proceeding, we noted that an important factor in our decision to reexamine the question of Washington/Baltimore helicopter service was the need to make changes in the pattern of flights presently serving the area through Washington National Airport. With the volume

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[10] In this connection, it may be further observed that we are not restricting our authorization to the use of rotary-wing aircraft, and hence that the authorized carrier will be in a position to compete equipment-wise with any air taxi service. Additionally, of course, the possession of a certificate of public convenience and necessity and the financial strength of the applicant selected by us will enhance its ability to compete with taxi operators.

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of traffic at National approaching a level of 10 million annual passengers, a figure which the examiner observed "will represent saturation of [its] facilities," action is being taken on several fronts seeking to achieve a redistribution of some flights now serving National by promoting the use of the two outlying airports.[11] It is manifest that, apart from the possible transfer of some existing schedules from National to Dulles and Friendship, the vast majority of new schedules that will be required to accommodate traffic growth will serve this area through one of the outlying airports. Passengers utilizing such new flights will benefit from the helicopter service and will enhance the traffic available to it. Moreover, as the Department of Transportation points out, such a service may influence fixed-wing carriers to more readily shift existing schedules now provided at National to the less crowded outlying airports. Thus, the need for and justifiable optimism concerning the future traffic generation potential of the scheduled helicopter service may be based on three considerations: (a) normal growth resulting from maintenance of the helicopter's initial participation in an expanding volume of air travel to this area; (b) growth stemming from improved penetration factors as helicopter service gains increasing public acceptance; and

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[11] By reason of its proximity to the downtown area (4 miles, requiring 15 minutes by surface travel), National has been much preferred by travelers to and from the city of Washington over the Friendship and Dulles airports. At the present time, National accommodates nearly 70 percent of total area traffic, with a projected 1968 distribution of 10 million for National, 2.3 million for Dulles, and 3.3 million for Friendship. (I.D. p. 56.) This circumstance has produced a saturation of National's facilities, and has led to the *Washington-Baltimore Area Airport Investigation*, Docket 18712 (examining the possibility of diverting traffic out of National through use of the Board's certificate amendment powers) and the Notice of Proposed Rulemaking (14 CFR Part 93; 33 F.R. 12580) issued on September 5, 1968, by the Federal Aviation Administration (proposing the imposition of ceilings on the number of IFR flights per hour which may be handled through National Airport).

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(c) growth occasioned by the increase in traffic at the outlying airports because of the present saturation at National, in which the helicopter service will enjoy an enhanced competitive advantage over alternative surface modes, particularly among the many time-conscious travelers to and from the Washington/Baltimore area.

Notwithstanding the future traffic potential of helicopter service, we recognize that substantial losses will occur in the immediate future from the operation of such services, and that such losses may continue for a substantial period of time.[12] We disagree, however, with the conclusion of the examiner that the economic uncertainties involved preclude the Board from authorizing, in an experimental period, willing investors to conduct a potentially successful helicopter service which will benefit the traveling public and for which there is public support.[13] Among other statutory mandates, the Board is charged with responsibility for "[t]he encour-

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[12]Each of the applicants in the case forecast substantial first-year operating deficits, ranging from $306,600 to $1,400,000. Although two of the applicants, NCA and NYA, anticipate profitable operations by the third year, the examiner found that such estimates are subject to criticism on the basis of unrealistic cost computations. WAI has forecast losses declining from $1.4 million in the first year to $956,000 in the fifth year of operations. We find it unnecessary to accept or reject any of the individual forecasts. However, we find that any person undertaking to provide the service involved should be in a position to withstand substantial losses for an extended period of time.

[13]The Washington Metropolitan Board of Trade and the Baltimore civic interests support an authorization, as does the Department of Transportation. Congress has most recently reaffirmed its interest in the establishment of a scheduled helicopter service in this area by its passage of the National Visitor Center Facilities Act of 1968 (P.L. 90-264) in which it provided for the construction of a permanent heliport, capable of handling large transport-type helicopter aircraft, as part of the new Visitors' Center at Union Station (section 108). See also, S. Rep. No. 1865, 89th Cong., 2d Sess. (1966).

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agement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the National defense."[14] Where, as here, the Board has before it one or more applicants who are fit, willing, and able to provide a needed but economically uncertain experimental service without cost to the taxpayer, we are not persuaded that the Board should undertake to prevent private investors from incurring the risk of potential economic loss, absent a showing that certification of the proposed service will entail a material detriment to some segment of the general public.[15] In our view, the service which we authorize herein on an experimental basis will make available substantial benefits to the traveling public without material adverse financial impact on any segment of the public or the industry, and will offer an incentive to fixed-wing carriers to shift flights to the outlying airports

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[14]Section 102(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1302(a)).

[15]The Board has rejected in the past the suggestion that it should substitute its judgment for that of investors or the managements of carrier applicants as to the wisdom of entering into economically risky operations without subsidy eligibility, where it is found that public benefits will result from authorization of proposed service. See, *e.g.*, *Latin American Air Freight Case*, 16 C.A.B. 107, 113 (1952); *Air Freight Case*, 10 C.A.B. 573 (1949). In each of the three primary areas of air transportation for which federal subsidization has not been made available during the developmental period: air taxi, all-cargo, and supplemental air transportation, the Board has viewed the risk of possible operating losses, not as a basis for refusing to certificate (or exempt) a proposed operation, but primarily in terms of the extent to which such losses may impair a particular applicant's ability to conduct the contemplated service safely and efficiently.

Here, the applicant selected to provide the service is able to withstand the losses involved with minimal financial impact upon any of the individual air carrier stockholders. Also, our order contains the customary provision that our action herein does not constitute any determination for rate purposes with respect to such stockholders.

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and thereby contribute to alleviation of the present congested conditions prevailing at National Airport.

2. Also to be considered in determining whether to authorize a service are the contentions relating to so-called "enviromental impact" advanced by certain civic associations and individual property owners (hereinafter referred to collectively as "Concerned Citizens").[16] They urge that the Board must weigh the benefits of the proposed service against its possible adverse effects upon those on the ground in the area over which the operations will be conducted, that the present record is inadequate for that purpose, and that the Board either must deny the applications or reopen the record for further evidence with respect to environmental impact.

In our opinion, the record contains adequate data for the discharge of the Board's responsibilities with respect to "environmental impact."[17] No evidence which was tendered

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[16]The Palisades Citizens Association, Inc., The Committee against National, David and Livia Bardin, Archer and Jessie Bush, David and Anne H. Labovitz, and Carl Visek.

Petitions for intervention as formal parties under Rule 15 of the Procedural Regulations were denied by the examiner, whose action was upheld on review by the Board in Order E-25704 (September 19, 1967). They were, however, permitted to participate under Rule 14. Petitions for judicial review of the Board's denial of intervention were filed by Concerned Citizens in the Court of Appeals for the District of Columbia Circuit. Following issuance of the initial decision, the Court entered a *per curiam* order on July 16, 1968, noting that Concerned Citizens had not been prejudiced by any final order of the Board. It retained jurisdiction over the appeal pending further proceedings by the Board, and provided that its action was "without prejudice to application by the petitioners to the Board for the right to file a written statement and to be heard in oral argument before the Board." Concerned Citizens were heard in oral argument and, with the Board's permission, subsequently filed a full brief.

[17]As hereinafter indicated, other agencies of the Government are charged with responsibility for protection of the public against adverse environmental impact resulting from ordinary air carrier operations.

concerning this matter was excluded and a considerable amount was in fact adduced.[18] See Appendix, *infra.* Among the significant items was a study introduced by the Department of Transportation which presents information for evaluating the effects of helicopter noise resulting from choice of heliport location, method of operations, and routes to be flown, It presents information and procedures for estimating the composite noise exposure produced by helicopters of the type proposed to be utilized by the applicants and for comparing helicopter noise with other intermittent and continuous noise found in typical urban and suburban areas. As a Department witness testified, "these procedures permit an assessment of the extent to which helicopter noise is compatible with typical land uses." While the basic purpose of the study was to judge the suitability of heliport sites as well as land use changes that might be required, the Department's witness testified that it could "also be used to judge the suitability of enroute flight paths or to select flight procedures or enroute paths designed to produce the maximum compatibility."

As we understand the Department's position, it proposes to utilize these procedures in connection with the grant by the FAA of an air carrier operating certificate to the successful applicant in this proceeding and in determining the flight paths, altitudes and procedures which the carrier will be required to observe. As the Board pointed out in Order E-25704, these are among the most important of the many variable factors upon which the impact of aircraft noise depends. The carriers have, moreover, pledged themselves to cooperate fully with the Department of Transportation and the FAA to the end that their operations will be conducted in such manner as to minimize to the greatest pos-

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[18] "Concerned Citizens" adduced no evidence at the hearing, but rather took the position that it was incumbent upon the applicants or the Government to do so.

sible extent the noise impact. Thus, those on the ground are reasonably assured that the operations will not be permitted to intrude unduly upon their lives.[19]

Moreover, as the Department of Transportation points out, the major source of inconvenience from aircraft noise in the Washington area has been occasioned by aircraft—most of them jets—making their way up or down the river or across the city in arriving at or departing from National Airport. The record establishes that a helicopter is less noisy than a jet. To the extent, therefore, that noise from jet operations into and out of National Airport could be replaced by helicopter noise, and in that the presence of the helicopter service would militate against additional jet operations, the result would be beneficial to those on the ground.[20]

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[19]In their Exhibit CC-1, which purports to be an application of the FAA study, Concerned Citizens attempt to prove that helicopter operations would be incompatible with virtually every area within the District of Columbia and its environs. We have considered the exhibit. However, as NCA points out, it incorrectly applies the FAA methodology. For example, it does not appear to take into account other noise, intermittent and continuous, at the locations at which Concerned Citizens claims there would be incompatibility between helicopter operations and existing ground uses.

[20]The Department of Transportation believes that the introduction of helicopter service may induce the airlines to divert some of their flights from National to Dulles and Friendship. While, as Concerned Citizens argue, there is no concrete evidence that such a "trade-off" would occur in response to certification of helicopter service, the Department's position has been generally accepted elsewhere, and we accept it here. It is reflected in the statements of many responsible public witnesses and members of Congress during hearings relating to the establishment of a heliport in Washington, and in the reports of the Congressional Committees themselves. See Hearings before the Subcommittee on Public Buildings and Grounds of the House Committee on Public Works on H.R. 15024, 89th Cong., 2d Sess. (July 27 and 29, 1966); Hearing before the Subcommittee on Buildings and Grounds of the Senate Committee on Public Works, 89th Cong., 2d Sess. (October 11, 1966); H. Rept. No. 1828, 89th Cong., 2d Sess. (Aug. 9, 1966); S. Rep. No. 1865, 89th Cong.,

Despite all of the foregoing, we recognize that Concerned Citizens (or perhaps others) might find the noise from the service aggravating. On the other hand, the record shows clearly that reaction to noise is a highly subjective matter. Thus, helicopter service at San Francisco involves frequent flights over affluent residential areas at relatively low altitudes and yet there has been virtually no adverse community reaction. These circumstances, coupled with the facts that the evidence indicates that the best available scientific accoustical techniques will be applied by the FAA to the operation, and that the "environmental impact" is not different in kind from that already experienced, lead us to conclude that the potential adverse impact of its noise upon those on the ground does not outweigh the benefits of the service. We also note that, as the Department of Transportation asserts, the service may lead to some diminution of aircraft noise through the utilization of helicopter flights instead of jet flights.

Concerned Citizens argue that this is not enough. They contend that the applicants (or the Board) must compile a record affirmatively measuring the likely degree and extent not only of the noise and its effect upon those on the ground, but also the amount of air pollution which the service will create. They also contend that there must be an affirmative showing that the operation will be safe. Moreover, they contend that the record must contain a basis for comparing the service in all of these respects with other modes of transport, and that the Board cannot find that the service is required by the public convenience and necessity without comparatively evaluating the relative safety, noise, and air pollution features of the various forms of transport. We disagree. Assuming that the Board would be required to consider matters of the nature urged by

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2d Sess. (October 19, 1966). Indeed, we note that this was the precise position of the Palisades Citizens Association when it testified in support of the legislation.

"Concerned Citizens" in circumstances in which a showing is made of extraordinary hazards or inconvenience to persons on the ground, there is no such responsibility where, as here, the operations do not differ from ones which have long been conducted in other areas of the nation, and which, indeed, differ only in degree and not in kind from those already being conducted in the Washington area.[21]

Any new air service may add to the level of noise generated by existing air services and other sources at the points in question, and to some extent cause annoyance to those on the ground. Despite this, Congress has directed the Board to develop a well-rounded air transportation system and actively to promote air service. Where, as here, a new service will achieve these ends, it is required by the public convenience and necessity despite the fact that some additional noise may be the result. Where there is a showing on the record of unusual noise by an opponent of the service, a different result might be indicated. However, it has not heretofore been suggested that the Board should be required or even justified in refusing to certificate a new service which would contribute to the congressional objectives with respect to the development of the national air transportation system merely because it might create some addition noise, or be noisier than some other form of transport. On the contrary, the Congress has affirmatively chosen other means and other agencies for the protection of the public against the inconvenience of noise created by air operations.

Thus, the Department of Transportation Act provides, among other things, that in the performance of its duties the Department is to give full and appropriate consideration to the needs of the public, users, carriers, industry, labor, and the national defense (Sec. 2(b)(1)), and that the Department should take steps toward providing for "transportation. . . noise abatement, with particular attention to aircraft noise" (Sec. 4(a)). That agency "is now the focal

[21] Helicopters presently operate over the metropolitan area.

point for Government-wide activity in the field of aircraft noise abatement." S. Rept. No. 1353, 90th Cong., 2d Sess., p. 2 (1968).[22]

As a result of DOT recommendations, Congress only last July enacted P.L. 90-411 (82 Stat. 395) which added a new Section 611 to the Federal Aviation Act directing the FAA, subject to ultimate approval of the Secretary of Transportation to "prescribe. . . standards for the measurement of aircraft noise. . . and. . . such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise. . ., including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title" (*i.e.*, safety certificates). Nowhere in the hearings, committee reports, or floor discussion of the legislation is there any suggestion that new route proceedings under Section 401 are to be a vehicle for coping with the problem of aircraft noise.[23] On the contrary, the

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[22]In his Transportation Message to Congress of March 2, 1966, urging establishment of the Department of Transportation, the President recognized that the time had come for the Federal Government to take a part in efforts to alleviate the noise problem. To this end, he directed the "interested federal agencies" to study and recommend legislative or administrative actions in this area, in coordination with the President's science advisor, *i.e.*, the Office of Science and Technology in the Executive Office of the President. Significantly, the Board was not among the "interested federal agencies." Subsequent to enactment of the Department of Transportation Act, the Office of Science and Technology was transferred to the Department.

[23]In reporting favorably on this legislation, both the House and Senate Committees observed that the only solutions to the problem which hold any real promise are (1) new or modified engine and airframes (to which the new section 611 is primarily directed); (2) special flight operating techniques; and (3) planning for land use in areas adjacent to airports which will be most compatible with aircraft operations. H. Rept. No. 1463, 90th Cong., 2d Sess., p. 4; S. Rept. No. 1353, *supra*, at p. 2.

importance which Congress attached to action by the Department of Transportation, the FAA and local authorities rested in part upon the assumption that there would be an increasing need for more air transportation services.[24]

There are, moreover, practical objections to the contention that an application for new service must be denied in the absence of a showing as to the probable amount of noise and the degree and extent of resulting inconvenience to those on the ground, and unless the Board can make affirmative findings that the benefits of the service outweigh its deteriments. As previously indicated—and the record amply bears it out—any meaningful judgment in this area depends upon many variable factors, among the most significant being the location of heliports, and flight patterns and altitudes. As we stated in Order E-25704, these are matters which can finally be determined only by the local

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[24] Indeed, Congress may to a certain extent be deemed to have foreclosed such an inquiry insofar as helicopter service in Washington is concerned. In 1966 Congress enacted P.L. 89-759 (80 Stat. 1308) which authorized the General Services Administration, in consultation with the FAA, to "select . . . a Government-owned site within the District of Columbia which is appropriate for a temporary heliport." The legislative history indicates that GSA and FAA were to "consider all factors, such as safety, accessibility, adjacent land uses, traffic flow, disturbance to surrounding areas and so forth in selecting a site. . . ." (H. Rept. No. 1865, 89th Cong., 2d Sess., p. 3 (1966)). The provision of P.L. 89-795 quoted above was replaced by P.L. 90-264, which specifically authorizes selection of the roof of the parking facility of the National Visitor Center to be constructed at Union Station as the site for a *permanent* heliport. While Concerned Citizens contend that operations from this point would interfere with the environmental well-being of those living adjacent to Union Station, it is clear from the legislative history of these related measures that Congress intended the heliport to be used and, moreover, to be used for precisely the type of service we are authorizing. See H. Rept. No. 1865, 89th Cong., 2d Sess., p. 2. This Congressional determination would appear to be inconsistent with the view that the Board is required to undertake a detailed exploration of the impact of helicopter noise in that area.

authorities and by the FAA and the Department of Transportation.

In sum, it is our opinion that the primary federal responsibility for protecting the public against the inconvenience of noise resulting from aircraft operations has been delegated by Congress to the Department of Transportation and FAA, and Titles III and VI of the Federal Aviation Act provide the machinery for implementation of this objective insofar as air transportation is concerned.[25] We therefore reject Concerned Citizens' view of the applicants' burden of proof and the Board's responsibility with respect to aircraft noise in certification proceedings.[26]

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[25]For this reason alone we find inapposite such cases as *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F.2d 608 (C.A. 2, 1965), *cert. denied*, 384 U.S. 941 and other cases arising under the Federal Power Act. In all of them, the Power Commission was the sole representative of the public. Moreover, the Federal Power Act specifically directs the FPC to consider whether "the project . . . will be best adapted to a comprehensive plan for improving and developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses including recreational purposes . . ." 16 U.S.C. 803(a). We agree with NCA that section 102 of the Federal Aviation Act "is simply not comparable in its scope."

[26]Concerned Citizens also contend that the Board must seek review by the Advisory Council on Historic Preservation. The legislative history of the statute creating the Advisory Council indicates that its primary purpose is to preclude inadvertent physical destruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, and we are unable to conclude that it is applicable to the present situation. In any event, it provides only that the Advisory Council be given a "reasonable opportunity to comment" with regard to matters to which the statute is applicable and the Council has had such opportunity. The order instituting the investigation was published in the Federal Register. Moreover, the Attorney General is a member of the Council and the Department of Justice is a party to this proceeding. Thus, from a legal and practical standpoint, the Council has had notice of the proceeding. It has not, however, seen fit to comment.

For similar reasons, we reject the contention of Concerned Citizens that the applicants must present evidence with respect to the extent to which the helicopter service would pollute the air. The "National Emission Standards Act" (42 U.S.C. 1857f-6(d)(b)) directs the Secretary of Health, Education and Welfare to "conduct a full and complete investigation and study of the feasibility and practicability of controlling emissions from jet and piston aircraft and of establishing national standards with respect thereto, and [to] report to Congress the results of such study and investigation within one year from the date of enactment of the Air Quality Act of 1967, together with his recommendations."[27] It is clear, therefore, that air pollution from aircraft operations is not only a matter committed to another agency of the government, but that a scientifically acceptable basis for estimating the extent of helicopter air pollution is yet to be made by that agency.[28]

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[27]The Air Quality Act (P.L. 90-148, 81 Stat. 503) was enacted on November 21, 1967.

[28]We reject the noise abatement and air pollution conditions which Concerned Citizens suggest be incorporated in the certificate. The former are based upon Exhibit CC-1 and would prohibit operations at specific distances from various areas and sites. In view of the apparent inconsistencies heretofore noted between Exhibit CC-1 and the FAA study upon which it is based, and the fact that the conditions fail to take into account the need for coordinating the helicopter operations with FAA air traffic rules governing flight of other aircraft in the area (a matter for the FAA alone), it would be inappropriate at least for the Board to impose the proposed conditions. The Department of Transportation and the FAA can be expected to discharge their responsibilities to the public faithfully. Moreover, in view of the Department's statutory authority to compel compliance with its requirements, we reject its suggestion that the certificate contain a condition requiring observance of DOT noise abatement procedures.

The air pollution condition would require the successful applicant to consult with the Department of Health, Education, and Welfare and to follow their recommendations for minimizing the alleged adverse air pollution consequences of the service. As previously indi-

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Equally without merit are the contentions regarding the Board's duty to explore the safety aspects of the proposed service. Insofar as the relative safety of air transportation and other modes of transport is concerned, the Civil Aeronautics Act of 1938, in general, and Section 401, in particular, amount to a Congressional determination that air transportation is basically a safe mode of transportation which the Board is actively to promote. To the extent, therefore, that safety may be deemed an element of public convenience and necessity under the Act, no more is necessary than that *air* safety requirements be met.

The responsibility under the Act for establishment and enforcement of air safety requirements has been entrusted by Congress to the Federal Aviation Administration, not the Board, and the FAA has promulgated elaborate and detailed regulations with respect to all significant aspects of air safety.[29] Thus, regardless of the Board's views as to its safety, no operation could be commenced without satisfying FAA safety requirements. It follows that the safety of the proposed service is not normally a matter to be explored by the Board in determining whether the public con-

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cated, the Secretary of Health, Education, and Welfare has been charged by law with the responsibility of conducting a study of the feasibility and practicability of controlling air pollution by aircraft and of establishing standards with respect thereto, and to report the results of the study to Congress, together with his recommendations. If the study and recommendations lead to legislative or administrative requirements which air carriers must meet, the successful applicant herein will, of course, have to comply with them. It is not, however, the province of this Board to require air carriers to consult with the Congressionally appointed experts in this field when neither Congress nor those experts have imposed any such requirement, and particularly since the whole problem is one as to which studies are still in progress.

[29]Indeed, the basic purpose of Congress in replacing the Civil Aeronautics Act with the Federal Aviation Act was to relieve the Board of responsibility for safety regulation.

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venience and necessity require its authorization.[30] This is not to say that the Board blinds itself to safety factors in certificate proceedings. Indeed, where a unique type of service has been proposed involving manifestly dangerous operations, the Board has refused to authorize it. *All American Aviation, Combination Service,* 8 C.A.B. 241, 243 (1947). This is not such a case. It involves a conventional type of service which has been in operation elsewhere for many years with an excellent safety record.[31] Accordingly, Congress having left to the FAA the detailed supervision of the safety of all air transportation services, there is no re-

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[30] Indeed, the Conference Report on the 1938 Act, H. Rept. No. 3635, 75th Cong., 3d Sess., p. 68 states that "the Senate Bill provides that in issuing a certificate of public convenience and necessity to an air carrier, the Authority shall consider the ability of the carrier to operate safely. The House amendment, on the other hand, does not specifically make safety an element of certificates of public convenience and necessity, but only of air carrier operating certificates. The Conference Agreement follows the House amendment in this respect."

Of course, in any new route proceeding the Board must find "the applicant fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board" thereunder. Thus, the Board does consider whether a carrier is financially fit, a matter which has an obvious relationship to air safety requirements. Similarly, the Board considers "compliance disposition" which has an equally obvious relationship to air safety requirements and, indeed, in considering compliance disposition the Board may take into account safety violations of which an applicant has been found guilty by the FAA. These determinations, however, are a far cry from determinations that a given operation, aircraft, operating altitude etc. would or would not be safe.

[31] See *Los Angeles Airways, Certificate Renewal,* 14 C.A.B. 284, 300-301 (1951). We note that with the exception of two years, the passenger fatality rate for scheduled passenger service by helicopter carriers has been zero for every year between 1954 and 1967. In this same period the passenger miles flown have increased from 211,000 to 30,000,000. We recognize that there have been two fatal accidents this year, but this hardly suggests that helicopter service is uniquely hazardous.

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quirement of evidence or findings as to its safety, at least in the absence of any evidence indicating that the operation would be uniquely dangerous.[32]

3. We turn now to the question of the selection of an applicant to provide the service at issue in this proceeding. The record establishes, and all parties agree, that certification of only one applicant is necessary to adequately serve the Washington/Baltimore area. We are thus confronted with the necessity of selecting one of four applicants before us.[33]

Each of these four applicants is a citizen within the meaning of section 101 (3) of the Act; each possesses, or has access to, considerable managerial and operational experience in the field of commercial aviation; each has applied for and has expressed a willingness to provide the service contemplated in this investigation; and each has presented evidence of its proposed operations and its financial fitness to provide the authorized service. The examiner has undertaken a detailed analysis of the background, proposals, qualifications, and forecasts of each of the applicants. In our view, the factor of financial strength is of paramount importance in our selection of a carrier and hence we do not undertake to discuss the differences which exist between the applicants with respect to management, experience, and operating proposals other than to note that none of them are sufficiently

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[32] *E.g., Service to Alton-Wood River, Ill.*, 16 C.A.B. 48, 51-2 (1952).

[33] The remaining active applicants for authority in this proceeding are New York Airways (NYA), National Capital Airlines (NCA), Washington-Baltimore Helicopter Airways (WBHA), and Washington Airways, Inc. (WAI). A fifth applicant, Hutter Ports, has offered no evidence of his operational or financial fitness beyond the unsupported assertion that award of a certificate to him would be worth $60 million, upon which basis he would obtain the necessary financing, and that his operations will incorporate the best features of the other applicants' proposals. Under the circumstances, it does not appear that the record will permit a finding that Hutter Ports is fit, willing, and able to perform the transportation that is required.

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superior to the others in any of these areas to warrant its selection on such grounds despite a lesser showing of financial fitness. As previously noted, it will be necessary for the operator of the service to be in a position not only to make the outlays required to inaugurate service, but also to absorb substantial operating losses during the developmental period which may continue for some time.[34]

NYA has forecast its initial capital requirements at approximately $7 million, to be allocated between the financing of aircraft and related equipment ($4.5 million) and working capital ($2.5 million). Four S-61 helicopter aircraft will be acquired and financed under a lease-purchase financing arrangement similar to the lease arrangements that it has employed in its New York operations. While it contemplates no difficulty in raising the remaining $2.5 million through an equity financing arrangement to be accomplished through the sale of additional stock, we note that the letter offered in support of the feasibility of this financing plan (Hearing Transcript, pp. 703-4) was made expressly contingent upon the conclusion of contracts with the trunkline carriers "which will assure financial support from inception."[35] NYA does not allege that it has received any offers of financial assistance from any fixed-wing carrier, nor has it presented any evidence demonstrating that such

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[34]Similar considerations have led the Board to place primary emphasis on the aspect of financial fitness in a prior helicopter service investigation, in the interest of minimizing subsidy cost. *New York City Area Helicopter Service Case*, 15 C.A.B. 259, 268 (1951), in which NYA was selected in preference to a similarly well-qualified applicant "primarily on the ground of its better financial program."

[35]Moreover, in the recently-concluded *Pan American/TWA/NYA Agreement Case* (Docket 19861, Order 68-7-169, July 31, 1968), counsel for NYA stated that NYA has been unable to market additional stock because of the inadequacy of its existing financial support arrangements to cover the operating losses which it has been incurring in its New York operations. (Tr. 19; NYA-2.)

the lack of success of other helicopter operators in raising large amounts of capital through equity financing,[36] as casting grave doubts upon the ability of NCA to satisfy its capital requirements without recourse to debt financing.

We are equally skeptical as to the feasibility of NCA's forecast that it will be able to achieve profitable operations at the end of the second year of service and its avowed willingness to undertake operations in this area without any assurance of outside support. The examiner noted that the optimistic financial outlook advanced by NCA fails to "face up to the realities of [SFO's] own experience," and results from the planning of a "severe, if not spartan, service, from the standpoint of costs" (I.D. p. 62). We are disposed to agree with the examiner's assessment and find no basis in either the experience of NCA's parent, SFO, or in the evidence presented in the course of this proceeding to warrant a finding that NCA's highly optimistic forecast may be reasonably susceptible of attainment within the course of the experimental period.

WBHA anticipates initial capital requirements of approximately $4.6 million, and has forecast operating deficits for each of the first five years of operations at approximately $650,000 per year, requiring operating support of $1 million per year after allowance for return on investment and taxes. It has already received signed subscriptions, contingent upon the award of a certificate, covering the full amount of its proposed $1.5 million stock issue, and proposes to secure the balance of its capital requirements through an equipment financing arrangement in the amount of $2.8 million and other debt financing of $2 million.

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[36]WBHA points out (Br. pp. 29-31) that no other helicopter operator has been able to raise even one-half of the amount of equity capital proposed by NCA, and that present market conditions, the absence of any debt "leverage" in NCA's financial structure, and the uncertain economic prospects for the proposed service make the prospects for success of NCA's planned stock sale highly problematical.

support might be forthcoming, although it anticipates that financial assistance on the order of $1.5 million will be required over the first three years of operations.

The central feature of NYA's financial forecast is its plan to treat its Washington/Baltimore operations on an added-cost rather than fully allocated cost basis. It further contends that its expanded operations will permit it to achieve economies of scale in the area of general services and administration and other overhead expenses.

We agree with the examiner's characterization of NYA's added-cost accounting methodology as unacceptable in the context of a new route proceeding, particularly in light of the financial difficulties which NYA is experiencing in its New York operations. Suffice it to say that NYA's sketchy financing plan is wholly speculative and lacking in the degree of assurance which is imperative under the economic circumstances surrounding this proposed helicopter experiment.

NCA proposes to raise its entire initial capital requirements through the sale of a $6 million stock issue, which it anticipates will exceed its required initial capital expenditures by approximately $1.5 million. In support of the feasibility of this financing plan, NCA offers a letter of underwriting commitment in usual form, pursuant to which the New York firm of Auchincloss, Parker & Redpath has agreed to undertake the formation of an underwriting group, subject to market conditions and the grant of an acceptable certificate, and anticipates no difficulty in forming such a group "at this time." Considerable discussion in the record was directed to the nature and solidity of the commitment undertaken by the Auchincloss firm (Tr. pp. 164-199). As amplified by the statements of its sponsoring witness, Mr. Cortesi, we will accept NCA's assertion that the underwriting letter represents a "best-efforts" commitment to raise the stated capital, but we note that no assurance of success can be predicated upon a commitment of this type, and we view the economic prospects for the proposed service, and

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Commitments covering the full amount of its proposed equipment financing have been secured by WBHA from a number of the largest lending institutions in the Washington area, subject to qualifications and subject to the additional conditions that a loan guarantee be obtained from an acceptable guarantor, and that financial support from various airlines "or equivalent commercial revenues" be successfully negotiated. No specific commitment for the remaining $2 million in contemplated debt financing has been submitted, but WBHA asserts that it will be able to obtain additional credit in this amount on a short-term basis through financial institutions with which it has dealt in the financing of its existing operations.

WBHA has received no commitments for operating support from any fixed-wing carrier,[37] but proposes the imposition of a "helicopter availability charge" on all passengers using Dulles, Friendship, and National airports as the most desirable and feasible method of absorbing anticipated operating deficits.[38] In the alternative, WBHA asserts that it will be able to obtain needed support from the trunklines

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[37]WBHA's assertion on brief to the Board (p.3) that it has received offers of support from Braniff and Delta is not borne out by its own exhibits. WBHA's several support proposals were flatly rejected by Braniff (Exhibit WBHA-128, pp. 25, 32-35), and Delta's tentative offer of highly limited support was expressly conditioned "On a basis that [helicopter flights] . . . would be timed to coincide with the arrival and departure of our jet services" (Exhibit WBHA-128, p.39; see also: WBHA-128, pp. 43 and 49.)

[38]The proposed availability charge would consist of an assessment of approximately 10 cents (the precise amount to be determined in a subsequent rate proceeding) from each arriving and departing passenger at the three area airports, to be filed in the tariffs of the fixed-wing carriers and collected by them as part of the ticket price and to be paid to WBHA through the Air Traffic Conference. WBHA asserts that such a charge would be a fee for the availability of helicopter service, akin to the built-in charge for other services (*e.g.*, magazines, stereo music) which may or may not be used by a given traveler, but available to all.

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through support agreements similar to those in effect in other areas, and through the negotiation of joint fares, if its proposed availability charge is deemed unacceptable. We find the charge to be unacceptable both in that it is unnecessary since another applicant is in a position to withstand the losses involved without the imposition of such a charge and in that a protracted proceeding with resultant delay well might result if the Board attempted to impose such a requirement.[39] We conclude that the uncertainties surrounding the applicant's ability to obtain appropriate financing are such that it should not be selected in circumstances in which a stronger applicant is available.

WAI's financial plan, with respect to both initial capital requirements and future operating support, is embodied in its sponsorship by nine of the fixed-wing carriers presently serving the Washington/Baltimore area.[40] WAI forecasts an initial capital investment of $6.8 million, to be allocated primarily to the acquisition of four S-61 helicopter aircraft and related equipment, with the remainder to be devoted to necessary ground equipment and working capital. The participating carriers propose to contribute 25 percent of WAI's initial capital requirements ($1.7 million) with the remaining $5.1 million to be borrowed from commercial lending institutions. Although WAI did not offer evidence of existing commitments to furnish the debt financing which it proposes, the ability of the corporation to obtain credit in this amount has not been disputed.

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[39]Our Bureau of Operating Rights expressed serious doubt as to the legality of the proposed charge (Br., p. 24), and, if the carriers serving the area did not acquiesce, protracted rate and other proceedings probably would follow.

[40]The particulars of WAI's organization and the support agreement by which its operations are to be financed, are set forth in greater detail in the following section.

Operating deficits, forecast at an average of approximately $1 million per year for the first five years of operations, are to be absorbed in accordance with a loss-sharing formula by each of the participants in the joint venture, up to a maximum total loss in any given year of $2,250,000 and a maximum aggregate loss of $8 million, at which point WAI will seek permission to suspend operations.

As we have indicated above, the strength and certainty of WAI's financial plan is intrinsic to the nature of its organization, and makes available to WAI the collective financial strength and resources of all of the fixed-wing carriers participating in the consortium, subject to limitations on the obligation of the local service carrier members and to the overall limitation on losses contained in the carrier agreement.

On the basis of the foregoing considerations, we conclude that only WAI, of all of the applicants, has sufficient assured financial support, with respect to both initial capital requirements and future operating support, to absorb the initial operating losses and economic risks involved in the conduct of this experiment without diminishing the quality or quantity of service to be provided or compromising the helicopter management's freedom to innovate and experiment with the service at different fares and in additional markets in an effort to achieve self-sustaining operations.

In addition, an important consideration in the present reexamination of the need for, and feasibility of, scheduled helicopter service in the Washington/Baltimore area has been to avoid, to the greatest extent possible, the difficulties inherent in the present array of support arrangements by which scheduled passenger helicopter operations are maintained in other metropolitan areas. In particular, our order instituting this investigation expressed our determination that an opportunity to participate in any financial support which might be offered to the helicopter operator selected

herein be accorded to all of the trunkline carriers presently serving the Washington/Baltimore area,[41] in the interest of easing the burden of individual carrier support and to insure the provision of impartially scheduled helicopter service without discrimination against non-participating carriers, as well as to provide an opportunity for maximum traffic penetration by the successful applicant. In our view, the broadly-based financial support resulting from the fixed-wing consortium's sponsorship of WAI, together with WAI's pledge to schedule its operations without preference or advantage to any fixed-wing carrier serving the Washington/Baltimore area, conforms most closely to the Board's desire for impartiality.

We are fully cognizant that our selection of WAI represents a departure from our traditional selection of an independent operator to provide a proposed service. Our choice of WAI, however, reflects our conviction that the problem of providing economically viable scheduled passenger helicopter service in our metropolitan areas has proven to be exceedingly complex, and requires experimentation with new and unorthodox approaches to solution of the financial difficulties which have persisted in the other helicopter experiments. We believe that any risk of anticompetitive consequences stemming from the nature of WAI's organization, as urged upon us by the other applicants and the Department of Justice, may be fully safeguarded against by the imposition of appropriate conditions to our approval of the control and interlocking relationships involved in the con-

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[41] Toward this objective, and to insure that interested local service carriers would not be disadvantaged by any financial arrangements entered into between the trunkline carriers and the helicopter operator, each of the 14 fixed-wing carriers then authorized to serve the Washington/Baltimore area (Allegheny, American, Braniff, Delta, Eastern, Lake Central, Mohawk, National, Northeast, Northwest, Pan American, Piedmont, TWA, and United) were made parties to the proceeding by Order E-24133.

sortium, as set forth in the succeeding section. Furthermore, we believe that the nature of WAI's organization and undertakings offers far fewer dangers of preferential treatment than do the existing limited-participation support arrangements which have been employed to support helicopter service in other areas.

In sum, we are persuaded that the comparative public interest is best served by the selection WAI to provide the needed service subject to appropriate safeguards and the Board's continuing jurisdiction, as discussed below.[42]

4. WAI was organized as a Delaware corporation on June 27, 1967, pursuant to an agreement dated June 20, 1967[43] between ten of the fourteen fixed-wing carriers authorized to serve the Washington/Baltimore area[44] following a canvass of all of the fixed-wing carriers serving this area undertaken by American Airlines, as authorized by Order E-25020, April 20, 1967. The corporation was formed for the purpose of applying for authority to operate and support a helicopter service in the Washington/Baltimore area as a "joint venture," utilizing the financial resources and experience of the several participating carriers. WAI's application for authority and for approval of the control and interlocking relationships involved in its organization was consolidated

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[42]For the purpose of assessing the appropriate licensing fee pursuant to Part 389 of the Board's Organizational Regulations, we estimate that WAI will realize between $1,000,000 and $5 million in gross transport revenues during the first full year of operation of the new authority awarded herein.

[43]As amended by Supplement No. 1, July 21, 1967, and Supplement No. 2, September 22, 1967.

[44]The participating carriers were Allegheny, American, Eastern, Lake Central, Mohawk, Northeast, Northwest, Pan American, TWA, and United. Braniff, Delta, National, and Piedmont did not elect to participate in the joint venture. The recent merger of Lake Central into Allegheny has subsequently reduced the number of separate participants in the joint enterprise to nine.

for hearing and disposition in this proceeding by Order E-25445, July 24, 1967.[45]

As, amended, the agreement provides, *inter alia*, that the board of directors of WAI shall consist of one member from each of the participating carriers; that any member desiring to sell or transfer its stock in the corporation must first tender to the corporation and, if not accepted by the corporation, may sell such stock only to an air carrier authorized to provide scheduled passenger service at Dulles, National, or Friendship airports which is, or proposes to become, a party to the agreement; that the trunkline parties (except Northeast Airlines) shall contribute 98 percent of the equity capital required by the corporation, not to exceed a maximum individual contribution of $500,000, and the local service carrier parties and Northeast shall contribute 2 percent of the equity capital, up to an individual maximum of $20,000; that operating losses incurred by WAI shall be shared between the trunkline parties as a group and the local service carrier parties as a group in proportion to the total revenue passenger miles of traffic of each class of carrier transported to and from Washington/Baltimore, subject to a limitation on the amount of loss allocable to any local service carrier not in excess of that carrier's equity investment in WAI; that WAI will seek a certificate permitting it to cease operations in the event that operating losses in any one year exceed $2,250,000, or aggregate losses exceed $8,000,000; that any party may withdraw from the agreement if the C.A.B. imposes conditions upon its approval of the agreement which that party deems unacceptable, and, in the event that any party so withdraws, any other party may then withdraw from the agreement.

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[45] An application by San Francisco & Oakland Helicopter Airlines and M.F. Bagan in Docket 17761, consolidated herein, seeking approval of certain control and interlocking relationships between the applicants and NCA has been mooted by our denial of NCA's application and, accordingly, will be dismissed.

Objections to approval of the agreement by which WAI was formed and the control and interlocking relationships involved therein have been advanced by each of the other applicants in this proceeding and by the Department of Justice. The Bureau of Operating Rights and WAI urge approval of the agreement. While he did not reach the question of approval of the WAI agreement, the examiner noted that the WAI proposal "conforms to the Board's suggestion with respect to impartiality. . . [and] will be considered as the avenue to be followed for assistance from this source." (I.D. pp. 58-9)

NCA, NYA, WBHA, and the Justice Department, in opposing approval, allege primarily that the WAI consortium presents serious conflict-of-interest and anticompetitive implications. In addition, each of the applicants asserts that a corporation run by competitors will be unworkable as a practical matter, and would require a major departure from established Board policy. The Department of Justice expresses concern that nonparticipating carriers may be prejudiced through the participants' control of helicopter schedules and anticipates difficulties in connection with the stock sale restriction and the negotiation of joint fares. It urges that WAI only be certificated if no independent willing and able applicant can be found.

WAI argues that the joint venture support arrangement is the only feasible and acceptable method for providing the necessary financial assistance to scheduled helicopter operations in the Washington/Baltimore area, in conformity with the Board's desire for impartial support, and in view of the unique terminal situations at Dulles, National, and Friendship which make preferential helicopter landing sites impossible, thereby eliminating the incentive for individual carrier support. In addition, it asserts that the nature of WAI's sponsorship will serve the public interest by permitting the participating carriers to contribute their experience, as well as their resources, to the helicopter operation, and by creating a more truly independent management that would be

the case of a management responsible to only one or two underwriting carriers. Finally, WAI states that it will encourage the negotiation of joint fares, and that its interval scheduling policy will assure that no preference is given to a minority of carriers.[46]

We are cognizant of the difficulties created by the various support arrangements currently employed in providing financial assistance by several trunkline carriers to scheduled helicopter operations in other metropolitan areas, and we have found that considerable financial assistance will be required to sustain a new helicopter service in this area through the period of anticipated developmental losses. It appears that the formation and sponsorship of WAI by a number of fixed-wing carriers authorized to serve the Washington/Baltimore area is a justifiable attempt by the carriers to take steps on their own to deal with the problem of helicopter support. It further appears that the fixed-wing consortium, by reason of its organization and express undertakings, will be able to provide a helicopter service which conforms to the Board's desire for impartiality, without preference or discrimination against nonparticipating carriers. Consequently, we find that the agreement, conditioned as provided for hereinafter, and the control and interlocking relationships created thereby, should be approved under sections 408, 409, and 412 of the Act. As conditioned, we find that the fixed-wing carrier agreement creating WAI is not adverse to the public interest or in violation of the Act, and that the control relationships approved herein will not result in creating a monopoly, or monopolies, and thereby restrain competition or jeopardize any air carrier not a party to the agreement.

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[46]Under an "interval scheduling policy," WAI states that it will schedule helicopter arrivals and departures at each of the three airports at regular intervals (varying from 30 to 50 minutes, depending on the time of day) throughout the day, rather than gearing its schedules to the arrivals and departures of specific fixed-wing flights serving the Washington and Baltimore airports.

The agreement does not provide for the participation of other interested fixed-wing carriers, except in the case of carriers subsequently authorized to serve Washington or Baltimore, who were not so authorized at the time the agreement was negotiated.[47] In our view, grant of an opportunity to participate in the consortium by any trunkline or local service carrier presently serving, or subsequently authorized to serve, the Washington/Baltimore area is in keeping with the Board's desire that any interested carrier be accorded an opportunity to participate in the support of the helicopter service. Accordingly, we will direct that any trunkline or local service carrier presently serving, or subsequently authorized to serve, Washington or Baltimore be given an opportunity to participate as of right in the consortium within 12 months from the date of certification of the helicopter service, and that, subsequent to the expiration of the 12-month period, any such carrier may apply to the Board for an order directing its admission to the consortium on reasonable terms, in the event that such admission is refused by the consortium.[48] Finally, the Board will retain jurisdiction over the consortium for the purpose of taking such further action in the future as may be found necessary.[49]

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[47] A provision in the agreement, inviting other fixed-wing carriers authorized to serve Washington/Baltimore to join the consortium within 20 days from the date of the agreement, no longer avails the four fixed-wing carriers presently serving this area who declined to participate at the time the agreement was negotiated.

[48] The Board contemplates that the terms upon which a subsequent participant is to be admitted will include a requirement that such participant contribute its pro rata share of the losses experienced by the helicopter operation from the time that such participant first became eligible to participate in the corporation.

[49] As discussed earlier, the approval granted herein is not to be deemed a determination of the reasonableness of the terms of the agreement for rate-making purposes.

The certificate to be issued to WAI will not include a condition authorizing the automatic suspension of WAI's obligation to provide service thereunder in the event that losses exceed $2,250,000 in any single year or aggregate losses exceed $8 million, as requested by WAI, since, in our view, such a provision would be inconsistent with the Board's responsibilities under section 401(j) of the Act. We find, however, that the loss limitations proposed by WAI, and the reasons advanced in support of them, are not unreasonable or inappropriate. Accordingly, we will be disposed to view the occurrence of losses of such magnitude as convincing evidence that abandonment of the service is in the public interest in the event that an application for abandonment is filed by WAI in the future.

Finally, we have determined not to impose two conditions requested by the Department of Justice upon our approval of the WAI consortium. In view of the provisions of sections 404(b) and 411 of the Act, we find unnecessary the suggested condition prohibiting WAI from engaging in any discriminatory practice and we note our retention of jurisdiction over the consortium, as urged by the Justice Department, as a further safeguard against the danger of discriminatory activities. In addition, we find no evidence in the record which would warrant the imposition of a condition, requested by the Department of Justice for the first time during the course of oral argument before the Board (Tr., pp. 118-124), requiring the sale of WAI's assets and good will to an independent operator at the end of the experimental period.[50]

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[50]We note, however, that the Board's order approving renewed support agreements and additional control relationships between NYA and Pan American and TWA (Order 68-7-169, July 31, 1968) expressly stated that: "the condition retaining jurisdiction is imposed for the purpose of guarding against all unforseen practices or circumstances that may be inimical to the public interest. Under such condition, the Board considers that it will possess authority to take any reasonable action which changed circumstances may require and which properly may be found to be in the public interest in light of all the circumstances involved. . . ." (Mimeo., p. 4.)

5. The service under investigation in this proceeding, as defined by Orders E-24133 and E-24548, includes service between the downtown city centers of Washington and Baltimore, on the one hand, and each of the three area airports, on the other hand, as well as inter-airport service between each of the three airports. In addition, issues of service between the two city centers, and consideration of the grant of an "area" authorization have been included within the scope of this proceeding.[51]

Primary attention during the course of the proceeding has been focussed upon ten markets comprising all pairings of the Washington and Baltimore city centers and National, Dulles, and Friendship airports, although several applicants (including WAI) have noted the possibility of inaugurating service at a number of suburban points at a time when projected traffic, and the availability of satisfactory landing sites, appear to warrant institution of such additional service.

We have determined that the public convenience and necessity requires issuance to WAI of a certificate authorizing the transportation of persons, property, and mail, on a subsidy-ineligible basis, for a period of five years, between the terminal point Dulles International Airport, the intermediate points Washington National Airport, downtown Washington, D.C., Friendship International Airport, and the terminal point downtown Baltimore, Md.[52]

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[51] In order E-24548, the Board directed that any area authorization which might be granted herein would be limited to the metropolitan areas of the cities of Washington and Baltimore, as defined by a radius of approximately ten miles from the downtown city centers of each city with "the precise definition to be resolved on the basis of facts established at the hearing."

[52] We recognize that the present lack of approved transport-type helicopter landing sites will necessitate a delay in the institution of service to both downtown Washington and downtown Baltimore until such sites become available and are approved by the FAA. Accordingly, we will waive compliance with the requirements of Part 205 of the Economic Regulations, relating to the inauguration of service at

In addition to the certificate authority which we award herein, we have determined that the public interest requires grant of a temporary exemption authorizing the transportation of persons, property, and mail on a subsidy ineligible basis between points within the metropolitan areas of Washington and Baltimore, other than the downtown city-center landing sites, and each of the three airports serving the Washington/Baltimore area.[53] We have explained extensively in previous cases, in terms fully applicalbe here,[54] the limited extent of, and the unusual circumstances affecting, the operation of suburban helicopter services which would make it an undue burden on the carrier and contrary to the public interest to require the carrier to go through certificate amendment proceedings each time it wished authority to vary its service pattern in providing service to suburban points in the Washington and Baltimore metropolitan areas. In our view, the authorization of suburban service by exemption, rather than in the certificate, will afford to WAI necessary flexibility in making rapid and frequent route adjustments to accommodate the changing needs of the postal service and of the traveling public. In an experimental operation such as this, the advantages to be gained in permit-

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Washington and Baltimore city-center locations, until such time as suitable landing sites receive FAA approval. If, after such sites in either city have received FAA approval, WAI determines that it does not desire to inaugurate service within 90 days of the date of such FAA approval, the carrier shall file an application for postponement pursuant to section 205.2 of the Economic Regulations.

[53] For the purpose of delineating the scope of the area which may be served pursuant to this grant of exemption authority, the "metropolitan areas" of Washington and Baltimore shall be deemed to include all communities located within a radius of approximately ten miles from the Zero Milestone in Washington, D.C., and from the Washington Monument in Baltimore, Md.

[54] *Los Angeles Helicopter Case*, 8 C.A.B 92 (1947); *Chicago Helicopter Service Case*, 9 C.A.B. 687 (1948); *Los Angeles Airways, Certificate Renewal*, 14 C.A.B. 284 (1951).

ting the carrier to make prompt changes in its service pattern are essential to a successful outcome of the experiment.

The Bureau and the DOT have urged that the duration of the helicopter experiment authorized herein be limited to a period of five years, and WAI has indicated its willingness to accept temporary certification for a period of not less than five years. We believe that a five-year authorization will be sufficient to permit the conduct of an adequate experiment. Moreover, limitation of the authorization herein to a temporary five-year period will permit the Board to more readily reassess the need for the service and the desirability of fixed-wing carrier control of the helicopter operator. Accordingly, we conclude that limitation of the experiment to a period of five years is required by the public convenience and necessity.[55]

We have further determined that we will not impose a restriction limiting WAI to the use of any particular type of equipment, such as rotary-wing aircraft, in providing the service which we authorize herein.[56] We are cognizant of

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[55]The DOT has proposed that the Board impose conditions in the certificate to be awarded to WAI herein specifying minimum adequacy-of-service standards, defined in terms of minimum daily departures from specified points, in the interest of insuring an adequate quantity and quality of service during the experimental period. We are unable to perceive any need therefor. The Board's powers with respect to adequacy of service under Section 404(a) of the Act, together with WAI's own economic interest in developing traffic through the operation of a reasonable pattern of service, make imposition of DOT's requested condition unnecessary, and might adversely affect the carrier's freedom to experiment with different patterns of service in response to changing circumstances which are unforeseen at this time.

[56]Such restrictions were historically imposed in helicopter service investigations, not for the purpose of limiting the carrier's choice of equipment, but as a means of accurately describing the kind of service which these carriers were being authorized to provide. See *Los Angeles Airways Renewal Case*, 27 C.A.B. 36 (1958).

the technological advancement in the development of a number of types of VTOL/STOL aircraft which may, now or later, be suitable for the conduct of operations envisioned in this investigation. If the type of service which WAI proposes to render initially using S-61 helicopter aircraft may be performed with greater efficiency, dependability, and economy in the future with other types of aircraft, there appears to be no sound reason for precluding WAI from taking advantage of technological advancement in aircraft design.[57]

Accordingly, in view of the foregoing and all the facts of record, we find:

1. That the public convenience and necessity require issuance of a temporary certificate for route 160 to Washington Airways, Inc., authorizing the transportation of persons, property, and mail on a subsidy ineligible basis for a period of five years between the terminal point Dulles International Airport, the intermediate points Washington National Airport, downtown Washington, D. C., Friendship International Airport, and the terminal point downtown Baltimore, Md.

2. That Washington Airways, Inc., is a citizen of the United States within the meaning of the Act, and is fit, willing, and able properly to perform the transportation authorized herein and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board thereunder.

3. That simultaneously with the issuance of the above-described certificate a temporary exemption with respect to persons, property, and mail should be issued to Washington Airways, Inc., exempting that carrier from the provisions of section 401 of the Act and from the terms, conditions, and limitations of the said certificate of public convenience and necessity so as to authorize Washington Airways, Inc., to provide service between any points with-

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[57] *New York Airways Renewal Case*, 30 C.A.B. 898 (1960).

in the metropolitan areas of Washington, D.C., and Baltimore, Md. (as defined by a radius of approximately ten miles from the Zero Milestone in Washington and from the Washington Monument in Baltimore), on the one hand, and each of the three airports (Dulles, National, and Friendship) serving the Washington/Baltimore area, on the other hand. The foregoing exemption shall remain in effect for a period of five years, co-extensive with the term of the temporary certificate issued herewith.

4. That the agreement creating various control and interlocking relationships involved in the organizational structure of Washington Airways, Inc., shall be approved under sections 408, 409, and 412 of the Act, subject to the conditions described herein, and to the retention of Board jurisdiction over the consortium for the purpose of taking such further action in the future as appears necessary. The approval herein is not to be deemed a determination of the reasonableness of the terms of the agreement for rate-making purposes.

5. That simultaneously with the issuance of our opinion herein, we will issue a Notice of Proposed Rule Making proposing the amendment of sections 298.21(b) (2) and (d) of Part 298 of the Board's Economic Regulations to the extent necessary to permit the operation of regularly scheduled and irregular inter-airport air taxi services in competition with the scheduled helicopter operations which we have authorized herein.

6. That the application of San Francisco & Oakland Helicopter Airlines and M. F. Bagan in Docket 17761 seeking approval of certain control and interlocking relationships between the applicants and National Capital Airlines shall be dismissed as moot.

7. That, except to the extent granted herein, all applications, motions, and requests filed herein shall be denied.

Appropriate orders will be entered.

CROOKER, Chairman, MURPHY, Vice Chairman, GILLILLAND and ADAMS, Members, concurred in the above opinion. MINETTI, Member, did not take part in the decision.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,634

NATIONAL CAPITAL AIRLINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD,
Respondent

WASHINGTON AIRWAYS, INC.,
Intervenor

Petition for Review of Order of the
Civil Aeronautics Board

Decided September 12, 1969

Mr. Julian H. Singman, with whom *Messrs. B. Michael Rauh* and *Orlin L. Livdahl, Jr.* were on the brief, for petitioner.

Mr. Warren L. Sharfman, Associate General Counsel, Litigation and Research, Civil Aeronautics Board, with whom *Messrs. Joseph B. Goldman*, General Counsel, *O. D. Ozment*, Deputy General Counsel, *Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondent.

Messrs. Howard C. Westwood, William H. Allen and *Richard D. Copaken* were on the brief, for intervenor.

Before McGOWAN, TAMM and ROBB, *Circuit Judges*.

ROBB, *Circuit Judge.* This is a petition[1] by National Capital Airlines (National Capital) to review an order issued by the Civil Aeronautics Board in a proceeding known as the Washington-Baltimore Helicopter Service Investigation. In that proceeding National Capital was an unsuccessful applicant for a certificate of public convenience and necessity,[2] authorizing scheduled helicopter service in the Washington-Baltimore area. The challenged order awarded a certificate for that service to the intervenors, Washington Airways, Inc. (Washington Airways).[3] By the same order the Board approved[4] the ownership and control of Washington Airways by its organizers, nine of the fixed-wing carriers authorized to serve the Washington-Baltimore area.

The petitioner attacks the Board's order on several grounds. First, it contends that the Board abused its discretion by permitting Washington Airways to participate in the proceeding, and that the Board committed other procedural errors to the prejudice of the petitioners. Second, petitioner contends that the Board's approval of ownership and control of Washington Airways by its sponsors is unlawful under the Federal Aviation Act and the anti-trust laws because this joint venture of nine carriers will result in the creation of a monopoly and will restrain competition. Finally, the petitioner argues that the Board's conclusion that Washington Airways is better qualified than National Capital to perform the service certificated is not supported either by substantial evidence or by adequate subsidiary findings.

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[1] Pursuant to 49 U.S.C., Sec. 1486(a).

[2] Under Sec. 401 of the Federal Aviation Act, 49 U.S.C. 1371.

[3] The certificate was a "temporary" one "authorizing the transportation of persons, property, and mail on a subsidy ineligible basis for a period of five years between the terminal point Dulles International Airport, the intermediate points Washington National Airport, downtown Washington, D.C., Friendship International Airport, and the terminal point downtown Baltimore, Md."

[4] Under Sec. 408, 409 and 412 of the Federal Aviation Act, 49 U.S.C. 1378, 1379, 1382.

We find the petitioner's arguments unpersuasive and we affirm.

National Capital is a corporation organized under the sponsorship of San Francisco & Oakland Helicopter Airways (SFO) for the purpose of operating a helicopter service in the Washington-Baltimore area. Forty-nine percent of the issued common stock of National Capital is held by SFO and its president. The remaining shares have been purchased by persons with business or other interests in the Washington-Baltimore area.

Washington Airways is likewise a corporation organized solely to apply for a certificate in the Washington-Baltimore Helicopter Service Investigation and operate the service if it received the authority. Although it is owned by nine of the airlines that serve Washington and Baltimore, other airlines serving the two cities are free to become owners.

Ninety-eight percent of the stock of Washington Airways is owned in equal shares by six trunkline air carriers: American Airlines, Eastern Airlines, Northwest Airlines, Pan American World Airways, Trans World Airlines and United Air Lines. The remaining two percent is owned by two local service carriers, Allegheny Airlines and Mohawk Airlines, and a trunkline carrier, Northeast Airlines. Northeast Airlines and the two local service carriers receive government subsidy. The board of directors of Washington Airways is made up of one representative of each of the owning carriers. The maximum equity contribution of each of the unsubsidized trunk carrier owners is $500,000. The maximum contribution of each of the local service carriers and Northeast is $20,000. There is a formula, based on relative amounts of revenue passenger miles of traffic transported to and from Washington and Baltimore by each of the carrier owners and the relative use of Washington Airways' services by passengers of the respective carrier owners, by which the losses expected to be generated by the helicopter operation are to be shared among the owners. So far as the local service carriers are concerned, neither of them can be made to absorb in any year any part of the loss in excess of its maximum equity investment of $20,000.00

The record discloses that helicopter operations in the past have not been self-supporting. For a time Congress authorized the payment of subsidies to helicopter operators, and pursuant to this authority the Board certificated helicopter service for the metropolitan areas of Los Angeles, New York and Chicago. This experiment came to an end in 1965 when Congress directed that no more subsidies be paid. Since that time the service at New York and Los Angeles, as well as the service in the San Francisco Bay area, that the Board had meanwhile certificated without subsidy eligibility, have been supported by one or more trunkline carriers in each area.[5] In return for their financial assistance the fixed-wing carriers have ordinarily received favored treatment of some sort from the helicopter operators; for example, the helicopter terminals have been located at or near the terminals or gates used by the supporting fixed-wing carriers.

In a case decided in 1963 the Board concluded that the public convenience and necessity did not require helicopter service subsidized by the government in the Washington-Baltimore area. *Washington, D. C., Helicopter Service Case,* 38 C.A.B. 823 (1963). None of the applicants in that case was willing to accept a certificate that did not contemplate the possibility of subsidy. In 1966, however, the Board concluded that the matter should be re-examined. The Board was led to this conclusion by several factors: (1) the rapid growth of traffic in the area since 1963, (2) the congestion at Washington National Airport creating a need to move flights from Washington National to more distant airports and (3) the interest in supporting helicopter service shown by trunkline carriers in other parts of the country. Accordingly, the Board began a new Washington-Baltimore helicopter service investigation, to determine whether this service could now be maintained without federal subsidy. The Board made all the trunkline carriers serving the Washington-

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[5]After the federal subsidies were terminated Chicago Helicopter Airways petitioned the Board for permission to suspend service and suspension was granted by the Board.

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Baltimore area parties to the case and said that they would be given an equal opportunity to participate in any financial arrangement with any helicopter operator selected for a certificate. The local service carriers of the area were also made parties. The Board's purpose in this designation of parties was to "avoid any unfair competitive disadvantage to non-participating carriers", and to insure that "any financial arrangements with trunkline carriers will not disadvantage local service carriers." C.A.B. Order No. E24-133, August 29, 1966.

The Board's order instituting the proceeding required that all applications, motions for consolidation, and other procedural motions be filed before September 29, 1966. By that date eleven applications had been filed, including the application of National Capital. There was no application by a fixed-wing carrier and none which contemplated financial support by a fixed-wing carrier. Thereafter a prehearing conference with the examiner was held by the parties, pursuant to the Board's rules,[6] and the examiner issued his prehearing conference report, defining the issues and fixing procedural dates. Eleven days later American Air Lines filed a motion for a 30-day extension of the procedural dates that had been fixed. The stated ground of the motion was that American Air Lines desired to canvas other carriers to see whether it would be possible to develop a jointly held corporation to own and operate the helicopter service. At the same time American filed its own application for a certificate and asked that this application be consolidated for hearing with the others on file, if American's motion for an extension of time were not granted. As the reason for its late filing American represented that the emergency expedient of "trunkline-helicopter financial and management relationships", adopted by the airlines after the termination of federal subsidy payments in 1965, was unsatisfactory, but that there had been "little opportunity * * * to focus on the question of a long-term answer to the helicopter service problem." American

[6]Rules of Practice, Rule 23, 14 C.F.R. 302.23 (1969).

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submitted that there was "good cause", under the Board's rules,[7] for its late filing, because it "is no one's fault that there has not been an opportunity heretofore to focus on" the problem of developing a permanent financing scheme for helicopter operations.

The Board granted American's motion for an extension of the established procedural dates and for the consolidation of American's application for hearing and disposition with the others on file. The Board recognized the possible hardship which its order might cause to the other applicants who had prepared their cases for hearing; and the Board expressed doubt that in a "normal and usual type of a route proceeding" the reasons advanced by American for its late filing would have constituted "good cause" for American's untimely filing. The Board found, however, that the problems involved in the proceeding were not normal or usual; on the contrary, said the Board, "they are still complex and difficult, and the answers are elusive and it is far from clear at this point that they lie in a proceeding in which we are limited to authorizing the operation of such services only by persons who will be acting independently of the fixed-wing carriers who, in the final analysis, will provide the traffic which will sustain the helicopter services. The needs of the over-all public interest must govern our action herein. We find that this overriding public interest requires a consideration in the instant proceeding of the possibilities advanced in American's proposal, despite its untimely presentation." C.A.B. Order No. 25020, April 20, 1967.[8]

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[7]Rule 12(b) of the Board's Rules of Practice, 14 C.F.R. 302.12 (1969) requires that the movant shall "clearly show good cause for his failure to file" a motion or application on time.

[8]National Capital and another applicant opposed American's motion. The other applicant, Washington-Baltimore Helicopter Airways, Inc., filed in this Court a petition for review of the order granting the motion. It made the same arguments that are now made by National Capital. After argument on a motion to stay the Board proceeding pending review and on the Board's motion to dismiss, the petition for review was dismissed. No. 21,052, decided July 10, 1967.

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Following a further extension of time by the Board on June 19, 1967, Washington Airways was formed as a joint venture by the group of carriers, including American and other fixed-wing carriers serving the Washington-Baltimore area. Within the extended time allowed by the Board, but before Washington Airways was incorporated, an application for a certificate was filed by the joint venturers on behalf of Washington Airways. A motion to consolidate was filed at the same time. When Washington Airways was incorporated the application was amended to make the corporation an applicant and the Board consolidated the amended application into the proceeding. C.A.B. Order E25445, July 24, 1967.[9]

After a hearing, the examiner issued his initial decision. He concluded that there was no real or urgent need for the proposed helicopter service, and found that substantial deficits would be incurred by any operator of such service. In the light of these findings he considered that the proposed service would be a "luxury" service for relatively few users which would not justify the financial assistance that would be necessary, regardless of the source of the assistance. Before reaching this conclusion, however, the examiner carefully considered and analyzed the financial and other qualifications and prospects of the applicants.

As it was authorized to do by its regulations[10] the Board acting upon its own initiative determined to review the initial decision of the examiner. It directed that any party "having objections to the initial decision shall file exceptions with the Board" and that "briefs in support of the exceptions or in support of the initial decision" might be filed. Exceptions to the initial decision were filed by all of the applicants

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[9]National Capital objected to the application on the ground that in several respects it did not conform precisely to the Board's Rules of Practice relating to the form and contents of such documents. The Board overruled the objections as "hyper-technical", finding that National Capital had not been prejudiced by the errors if any.

[10]Rule 28, Procedural Regulations, 14 C.F.R. 302.28.

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except Washington Airways. Thereafter briefs to the Board were submitted by all parties, including Washington Airways. In substance, Washington Airways in its brief supported the conclusion of the examiner with respect to the lack of need for the service and the financial losses it would entail. On the other hand Washington Airways submitted that if the Board disagreed with these conclusions and determined to certificate such a service, then Washington Airways was best qualified to provide it.

National Capital moved to strike Washington Airways' brief and to prohibit it from appearing in oral argument on the ground that the Board's order of review provided that only briefs in support of exceptions or in support of the examiner's decision would be received. In its opinion on the merits, the Board denied this motion, holding that Washington Airways had argued in support of the examiner's ultimate conclusion, and that it would be unreasonable to deprive Washington Airways of an opportunity to urge, in the alternative, the merits of its own application if the Board should reverse the examiner's decision that there was no need for the proposed service. C.A.B. Order Nos. 68-11-71 and 68-11-72, November 18, 1968.

On the merits the Board disagreed with the examiner and found that the public convenience and necessity required certification of the proposed helicopter service, without benefit of federal subsidy, for an experimental five-year period. The Board based this conclusion upon its finding that a substantial volume of traffic would be available to the helicopter operator, because of the remoteness of Friendship and Dulles airports from Washington and the large amount of travel to and from the seat of government by businessmen, professional people and tourists. The Board recognized nevertheless that from the beginning the operator of the service would incur substantial losses which might continue for a long time. Accordingly, the Board found that "any person undertaking to provide the service involved should be in a position to withstand substantial losses for an extended period of time."

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Noting that the examiner had "undertaken a detailed analysis of the background, proposals, qualifications and forecasts of each of the applicants" the Board found that there were no decisive differences between the applicants in respect of management experience and operating proposals. In these circumstances the Board concluded that the decisive factor was financial strength.

With respect to the factor of financial strength the Board concluded that only Washington Airways had "sufficient assured financial support, with respect to both initial capital requirements and future operating support, to absorb the initial operating losses and economic risks involved in the conduct of this experiment without diminishing the quality or quantity of service to be provided or compromising the helicopter management's freedom to innovate and experiment with the service at different fares and in additional markets in an effort to achieve self-sustaining operations." The Board based this conclusion upon the undisputed ability of Washington Airways to obtain its required initial investment of 6.8 million dollars by way of contributions from participating carriers and loans from commercial lending institutions. The Board noted that "the collective financial strength and resources of all of the fixed-wing carriers participating in the consortium" were available to Washington Airways. On the other hand, said the Board, National Capital proposed to raise its entire capital requirements through the sale of a six million dollar stock issue. In support of this plan National Capital presented a letter of underwriting commitment from an established underwriting firm. In its written commitment the underwriting firm stated: "We have no hesitation in stating that if your Company were to receive a Certificate to perform the services contemplated in the Washington/Baltimore Helicopter case—subject, of course, to market economic conditions and provided further that the Certificate were not too restrictive in its terms—we would be willing to undertake the formation of an underwriting group to underwrite the necessary equity financing. At this time we expect no difficulty in

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forming such a group." The Board found that "no assurance of success can be predicated upon a commitment of this type, and we view the economic prospects of the proposed service, and the lack of success of other helicopter operators in raising large amounts of capital through equity financing, as casting grave doubts upon the ability of [National Capital] to satisfy its capital requirements without recourse to debt financing." On the basis of the evidence in the record the Board was also skeptical with respect to National Capital's forecast that it would be able to show a profit at the end of the second year of operation and its willingness to forego any assurance of outside support. The Board pointed out, as did the examiner, that National Capital's financial optimism was inconsistent with the experience of National Capital's parent, San Francisco & Oakland Helicopter Airways, which received nearly $750,000 in support payments in its fourth year of operation. The Board agreed with the examiner that National Capital's projected profit resulted from a "severe, if not spartan, service, from the standpoint of costs".

The agreement among the air carriers to form Washington Airways required the Board's approval under Sec. 412 of the Federal Aviation Act, 49 U.S.C. 1382. Furthermore, upon the award of a certificate to Washington Airways, Secs. 408 and 409 of the Act (49 U.S.C. 1378 and 1379) required the Board to approve the interlocking relationships between the joint venturers and Washington Airways, and their control of Washington Airways. See *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F.2d 810 (2d Cir. 1941). Specifically, Sec. 408(b) provides that the Board "shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: * * *". Having examined the facts in the light of these provisions the Board, in the same order by which it awarded the cer-

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tificate, approved the airlines' joint control of Washington Airways.

The Alleged Procedural Errors

National Capital claims that the Board repeatedly violated its own procedural rules so as to permit Washington Airways to take part in the proceeding, and from this premise National Capital argues that the Board deprived it of due process of law. National Capital's principal contention in this connection is that consolidation of the application of Washington Airways into the proceeding was in violation of Board Rule 12(b),[11] since the motion to consolidate was not filed on time.

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[11] Rule 12—Consolidation of Proceedings.

"(a) *Initiation of consolidations.* The Board, upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although the Board may, in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and the Board will not undertake to search its docket for all applications which might be consolidated or contemporaneously considered.

"(b) *Time for filing.* Unless the Board has provided otherwise in a particular proceeding, a motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. If made at such conference, the motion may be oral. All motions for consolidation or considerations of issues which enlarge, expand and change the nature of the proceedings shall be addressed to the Board, unless made orally at the prehearing conference, in which event the presiding examiner shall present such motion to the Board for its decision. A motion which is not filed at or prior to the prehearing conference, or within the time prescribed by the Board in a particular

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National Capital does not contend that it did not have a full and fair opportunity to present its own case; in essence, the complaint is that because of the Board's actions an additional applicant was allowed to compete with National Capital and that applicant was chosen on the merits. The argument overlooks the fundamental principle, correctly applied by the Board, that "The Board's major standard is the public interest in having convenient routes served by fit and able carriers. These questions are to be determined in hearings after notice. The prime purpose of allowing interested persons to offer evidence is to give the Board the advantage of all available information as a basis for its selection of the applicant best qualified to serve the public interest." *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 578 (1950). The Board had before it the "complex and difficult" problem of providing helicopter service in the Washington-Baltimore area. The public interest required the Board to consider all available information bearing on the problem including all of the proposed solutions; if the Board had not done so it would not have carried out its statutory duties.

The petitioner's argument also overlooks the fact that Rule 12 permits the Board to consolidate applications "upon its own initiative". Thus, even if National Capital had filed its application independently and had not moved for consolidation, the Board on its own motion might have consolidated. As another alternative, the Board might have denied all timely filed applications, after hearing, and then have proceeded to an independent hearing on the applica-

proceeding, as the case may be, shall be dismissed unless the movant shall clearly show good cause for his failure to file such motion on time. A motion which does not relate to an application pending at the time of the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, or on the date specifically prescribed by the Board in a particular proceeding for filing of motions for consolidation or contemporaneous consideration, shall likewise be dismissed unless the movant shall clearly show good cause for his failure to file the application within the prescribed period." 14 C.F.R., Sec. 302.12 (1969).

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tion of Washington Airways. Plainly, the course adopted by the Board was sensible and in the public interest.

Other violations by the Board of its procedural rules alleged by National Capital are (1) the application of Washington Airways, as originally filed, was not signed by Washington Airways or any officer or other person authorized to act for it; (2) the application sought a "contingent" certificate, that is, one that authorized the applicant to cease operations upon incurring specified losses; (3) that the Board accepted the brief of Washington Airways although it had filed no exceptions to the initial decision; and (4) the participation of local service carriers in the enterprise would violate the Board's policy against non-transport activities by subsidized carriers. (14 C.F.R., Sec. 399.90 (1969)). We have considered all of these objections and find them to be without merit. None of the alleged errors prejudiced National Capital. See *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 126 U.S. App. D.C. 399, 411, 379 F.2d 453, 465 (1967). Thus, the fact that the application of Washington Airways was submitted before its organization was completed and was therefore signed "on its behalf", was not prejudicial to National Capital.[12] The Board did not grant

[12] *Superior Oil Co.* v. *Udall,* C.A.D.C. No. 22,192 decided Jan. 6, 1969, cited by petitioner, is not apposite. That case dealt with the submission of an unsigned, sealed "bid", a matter in which satisfaction of every formal requirement was vital.

The other cases cited by petitioner on this point are also distinguishable. Some of them deal with accusatory proceedings in which violations of procedural regulations resulted in prejudice amounting to a denial of due process: *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959) (denial of right to have specific charges and orderly hearing and right to cross-examine, in proceeding for dismissal of employee); *Service* v. *Dulles,* 354 U.S. 363 (1957) (violation of regulations resulting in discharge from employment); *U.S. ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954) (denial of fair and impartial consideration by Board of Immigration Appeals); *Pacific Molasses Co.* v. *F.T.C.,* 356 F. 2d 386 (5th Cir. 1966) (denial of right to have previous notice of witnesses and documentary evidence, so as to prepare for effective cross-examination). Other cases are illustrative of procedural violations which are inherently prejudicial or illegal: *Bonita, Inc.* v. *Wirtz,* 125 U.S. App.

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the "contingent" certificate suggested by Washington Airways. As for the filing of the brief of Washington Airways, it is plain that this was in conformity with the Board's order authorizing briefs in support of the examiner's decision. Finally the argument with respect to non-transport activities was not raised before the Board by National Capital and thus is not open to review here. 49 U.S.C., Sec. 1486(e). In any event the contention has no merit.

THE ANTI-TRUST QUESTION

As we have said, the agreement among the air carriers to form Washington Airways and the award of a certificate to that company required the approval of the Board under Secs. 412, 408 and 409 of the Federal Aviation Act, 49 U.S.C. 1382, 1378 and 1379. The Board gave its approval. The petitioner contends that the Board erred, that contrary to the Board's findings and in violation of Sec. 408(b) of the statute, the control of Washington Airways by the carriers together with the issuance of the certificate to Washington Airways will result in the creation of a monopoly and thereby restrain competition.

There is no doubt that Washington Airways, as the only carrier authorized by the Board to provide the proposed helicopter service, has a monopoly. The difficulty with petitioner's argument is that the monopoly results not from the Board's approval under Sec. 408 of the ownership and control of Washington Airways by the carriers, but rather from the certification by the Board pursuant to Sec. 401. Such a monopoly will always result when the Board certificates only one carrier to serve a given market. The result would have been the same had the Board chosen National

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D.C. 163, 369 F.2d 208 (1966) (minimum wage order approved in absence of employee members of Industry Committee); *Sangamon Valley Television Corp.* v. *U.S.*, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959), *cert. den.* 376 U.S. 915 (1954) (ex parte attempts to influence board members); *McKay* v. *Wahlemaier*, 96 U.S. App. D.C. 313, 226 F.2d 35 (1955) (award of oil and gas lease on public lands on basis of false or misleading application).

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Capital instead of Washington Airways. Here there was no suggestion by anyone that the Board should certificate more than one carrier; on the contrary it was agreed by all that the Board would choose one applicant as best qualified, to the exclusion of the others. In these circumstances the Board was justified in concluding that any anti-competitive effects resulting from the control of Washington Airways by the carriers were insubstantial and speculative, and were outweighed by the advantages to be gained. *Butler Aviation Company* v. *Civil Aeronautics Board*, 389 F.2d 517 (2d Cir. 1968). The Board carefully analyzed the matter and concluded:

> "We are cognizant of the difficulties created by the various support arrangements currently employed in providing financial assistance by several trunkline carriers to scheduled helicopter operations in other metropolitan areas, and we have found that considerable financial assistance will be required to sustain a new helicopter service in this area through the period of anticipated developmental losses. It appears that the formation and sponsorship of WAI by a number of fixed-wing carriers authorized to serve the Washington/Baltimore area is a justifiable attempt by the carriers to take steps on their own to deal with the problem of helicopter support. It further appears that the fixed-wing consortium, by reason of its organization and express undertakings, will be able to provide a helicopter service which conforms to the Board's desire for impartiality, without preference or discrimination against non-participating carriers. Consequently, we find that the agreement, conditioned as provided for hereinafter, and the control and inter-locking relationships created thereby, should be approved under sections 408, 409, and 412 of the Act. As conditioned, we find that the fixed-wing carrier agreement creating WAI is not adverse to the public interest or in violation of the Act, and that the control relationships approved herein will not result in creating a monopoly, or monopolies, and thereby restrain competition or jeopardize any air carrier not a party to the agreement." (Board's opinion, p. 35)

We think the Board's conclusion is supported by the record.

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Among the conditions referred to by the Board as being imposed were (1) that the consortium be open to any carrier servicing Washington or Baltimore and (2) that it retain jurisdiction of the consortium for the purpose of taking any such further action as might be found necessary, including a determination of the reasonableness of rates and the prohibition of any discriminatory activities. Finally, the Board proposed to continue to permit the operation of regularly scheduled and irregular inter-airport or taxi service in competition with the authorized helicopter operations. These conditions were effective safeguards against improper activities on the part of the certified carrier.

The Board noted also that the "interval scheduling policy" of Washington Airways would assure that no preference was given to a minority of carriers. Under this policy Washington Airways proposed to schedule helicopter arrivals and departures at each of the three airports at regular intervals throughout the day, rather than to gear its schedules to the arrivals and departures of specific fixed-wing flights serving the Washington and Baltimore airports. It appears also that the gate arrangements at the Washington and Baltimore airports make it difficult if not impossible to favor any particular carrier by the location of the takeoff and landing points of helicopters.

The petitioner argues that the certification of the Washington Airways consortium may eliminate the potential competition of one or more trunkline carriers in the Washington-Baltimore helicopter market. See *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964). The history of helicopter operations refutes the argument. No trunkline carrier is presently providing helicopter services in any market and no such carrier has ever sought certification to provide helicopter service on an individual basis. Nor is there any reason to believe that in the foreseeable future any individual carrier will request the privilege of sharing the losses involved in the Washington-Baltimore helicopter service. In short the facts of economic life would have produced the same result had the petitioner received

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a certificate and thus been granted the monopoly. If economic conditions should change, however, so that competition becomes practical, the Board is in a position to certificate a competing service.

THE SELECTION OF WASHINGTON AIRWAYS FOR CERTIFICATION

The petitioner challenges the Board's selection of Washington Airways rather than National Capital as the operator best qualified to provide the needed helicopter service. It says in particular that the Board's findings with respect to the adequacy of National Capital's financial plans were unsupported by the record.

Our consideration of this issue is of course limited by the provision of Sec. 1006(e) of the Federal Aviation Act, 49 U.S.C., Sec. 1486(e), that the findings of fact by the Board if supported by substantial evidence shall be conclusive. If the Board's ultimate conclusions rationally follow from facts properly found, that is the end of the matter. On the other hand, if after reviewing the whole record we find that the Board's findings and conclusions are unsupported by substantial evidence, then it is our duty to set them aside. ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C., Sec. 706(2)(E) (Supp. IV, 1965-1968); *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 U.S. App. D.C. 5, 240 F.2d 867 (1956), *cert. den.* 353 U.S. 941 (1957); *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 126 U.S. App. D.C. 399, 379 F.2d 453 (1967).

Considering the whole record in the light of the statutory definition of our province, we hold that the Board's findings and conclusions were reasonable, proper and supported by substantial evidence. As we have said, the Board considered and approved the examiner's careful and detailed analysis of the background, proposals, qualifications and forecasts of each of the applicants; and upon the basis of the examiner's findings with respect to these matters the Board concluded that the crucial difference between

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National Capital and Washington Airways was the superior financial strength of Washington Airways. We cannot say that this conclusion was unreasonable or unsupported by substantial evidence. The weight to be given to the factor of financial strength was a matter for the expert judgment of the Board. In view of the history of helicopter operations the Board not unreasonably concluded that the Washington-Baltimore service would impose substantial losses upon the operators, so that adequate financial support was vital. Nor was it unreasonable for the Board to conclude that National Capital was overly optimistic with respect to its financial prospects. Here again the dismal financial history of helicopter operations was a reasonable basis for the Board's conclusion. Comparing the financial backing of the two applicants it was not unreasonable for the Board to prefer the assured financial support of Washington Airways over the written underwriting commitment offered by National Capital, which pledged the underwriter only "subject, of course, to market economic conditions * * * to undertake the formation of an underwriting group to underwrite the necessary equity financing." Finally, there was support for the Board's preference of Washington Airways in its finding, based upon an analysis of National Capital's projected profit, that National Capital contemplated "severe, if not spartan, service, from the standpoint of costs".

Upon the whole record we conclude that there was no error in the Board's order.

Affirmed.

FILED
APR 28 1970

No. 1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NATIONAL CAPITAL AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD

and

WASHINGTON AIRWAYS, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT WASHINGTON AIRWAYS, INC. IN OPPOSITION

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April 1970

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BRIEF FOR RESPONDENT WASHINGTON AIRWAYS, INC. IN OPPOSITION

QUESTION PRESENTED

A proviso to Section 408(b) of the Federal Aviation Act prohibits the Civil Aeronautics Board from approving any merger, acquisition of control or other transaction within the Board's jurisdiction under Section 408(a) of the Act, if such transaction "would re-

sult in creating a monopoly or monopolies and thereby restrain competition . . . ."

The question is whether the Board was precluded by this proviso from approving the creation of Washington Airways, Inc., a company formed by a consortium of air carriers serving Washington and Baltimore, in a proceeding in which it determined that the public convenience and necessity required the issuance of a certificate to Washington Airways authorizing it to provide helicopter service in the Washington/Baltimore area.

STATEMENT

The Civil Aeronautics Board conducted a proceeding to determine (1) whether the public convenience and necessity required service by helicopter (or other aircraft suitable for very short hops) between Washington, D.C., Baltimore and the three commercial airports in the Washington/Baltimore area, Washington National, Dulles and Friendship and, if a need for the service was found, (2) which of several applicants should be awarded a certificate authorizing it to provide the service. The issues thus stated arise under Section 401 of the Federal Aviation Act. No applicant or any other party to the proceeding took the position that more than one applicant should receive a certificate.

The Board's hearing examiner, who conducted the evidentiary part of the proceeding, found that substantial operating deficits would be incurred for an indefinite period by any helicopter service and that the service would be a luxury for a relatively few users. He concluded that no certificate should be issued. (Pet. pp. B-2-B-3.) The Board did not disagree with the

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examiner's basic analysis of the economics of helicopter operations. Several helicopter operations in metropolitan areas have been authorized by the Board and none has ever been self-supporting. The Board, however, did find that the prospects for traffic were somewhat brighter than the examiner believed, while recognizing "that substantial losses will occur in the immediate future from the operation of [helicopter] services, and that such losses may continue for a substantial period of time." (*Id.* pp. B-4-B-12.)

Because of its view of traffic potential, the Board concluded that the public convenience and necessity required issuance of a five-year experimental certificate to conduct helicopter service. It selected this respondent, Washington Airways, Inc., to receive the certificate because it was the only applicant that had the financial resources required to sustain the initial heavy operating losses. (*Id.* p. B-29.)

Washington Airways' financial strength derives from its ownership. It was formed by certain of the air carriers serving Washington and Baltimore; its owners now number nine. The fixed-wing carriers serving the area joined together to form Washington Airways because of the experience in other metropolitan areas. Individual trunkline carriers have felt compelled to underwrite helicopter service in San Francisco, New York and Los Angeles since federal subsidy of such service was withdrawn in 1965.[1] As stated by American Airlines in asking the Board's approval of an attempt to form the Washington Airways consortium, "this

[1] When there was still federal subsidy of helicopter service, the Board found that the public convenience did not require subsidized helicopter service in the Washington/Baltimore area. Washington-Baltimore Helicopter Service Case, 38 C.A.B. 823 (1963).

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pattern places the trunklines in the unsuitable role of bankers, and precludes them from playing a management and promotional role in the development of helicopter services, a role for which they are better suited." (J.A. 46.)

One of the other applicants was the petitioner National Capital Airlines, Inc. It was organized under the auspices of San Francisco & Oakland Helicopter Airlines, the certificated helicopter carrier in the San Francisco Bay Area (which, like other certificated helicopter carriers, has survived only because its losses have been underwritten by trunklines). Because of the nature of their ownership Washington Airways and NCA were the subject of applications for approval under Section 408 of the Act, which deals with mergers, consolidations and acquisitions of control, as well as applicants for certificates under Section 401. One of the kinds of transactions for which Section 408(a) requires prior CAB approval is the acquisition by one air carrier of control of another. Under longstanding interpretation, an air carrier acquires control of another air carrier when a subsidiary becomes an air carrier by receiving a certificate. *Pan American Airways Co.* v. *CAB,* 121 F.2d 810 (2d Cir. 1941). The Section 408 applications of NCA and Washington Airways were folded into the certification case. The basic criterion for approval under Section 408(b) is the public interest, but a proviso to Section 408(b) says that the Board shall not approve a transaction covered by Section 408(a) if such transaction "would result in creating a monopoly or monopolies and thereby restrain competition . . . ."

By its final order in the proceeding, the CAB, in addition to granting Washington Airways a five-year

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experimental certificate, approved the application of its owners under Section 408; the latter approval was subject to conditions designed to eliminate any possibility that anticompetitive consequences would result from Washington Airway's being owned by fixed-wing carriers serving the area. (Pet. pp. B-33-B-36.)

NCA petitioned for review of the Board's order. Among other things, it urged that approval under Section 408 was barred by the anti-monopoly proviso quoted just above. The Court of Appeals held against all of NCA's claims, and, with respect to the question under the proviso to Section 408(b) that NCA now seeks to raise in this Court, it said:

> "There is no doubt that Washington Airways, as the only carrier authorized by the Board to provide the proposed helicopter service, has a monopoly. The difficulty with petitioner's argument is that the monopoly results not from the Board's approval under Sec. 408 of the ownership and control of Washington Airways by the carriers, but rather from the certification by the Board pursuant to Sec. 401. Such a monopoly will always result when the Board certificates only one carrier to serve a given market. The result would have been the same had the Board chosen National Capital instead of Washington Airways. Here there was no suggestion by anyone that the Board should certificate more than one carrier; on the contrary it was agreed by all that the Board would choose one applicant as best qualified, to the exclusion of the others." (Pet. pp. C-14-C-15.)

REASONS FOR DENYING THE WRIT

The decision below on the question raised here by NCA is on a narrow point of no general importance. There is no conflict with decisions of other courts of

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appeals or this Court. And the decision below is plainly correct.

1. So unsubstantial is the question presented by NCA that there is little to add to what is quoted just above from the opinion of the Court of Appeals.

Although the Board has acted to permit an operator of small helicopters to compete with Washington Airways,[2] it is fair to say that, as the court below put it, "Washington Airways, as the only carrier authorized by the Board to provide the proposed helicopter service, has a monopoly." But, as the court went on, that monopoly results from its certification under Section 401 and not from approval under Section 408 of its formation. Any applicant that received the certificate would have had such a monopoly. No applicant—NCA or any other—urged that two carriers be certificated to compete with each other. The monopoly Washington Airways enjoys has nothing to do with the fact that Washington Airways is owned by fixed-wing air carriers and therefore needs Section 408 approval—any more than NCA's monopoly, had it been selected as the recipient of the certificate, would have had anything to do with the fact that NCA needed Section 408 approval because it is controlled by another helicopter carrier.

That is the narrow question decided by the court below. It has nothing to do with possibly significant questions involving the application of the anti-monopoly proviso in cases where, for example, two airline competitors merge. Compare *Northwest Airlines* v. *CAB*, 303 F.2d 395, 401 (D.C. Cir. 1962). In this case the competitive services of the airlines that own

[2] CAB Order No. 70-4-18, April 3, 1970.

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Washington Airways are not affected by their joinder in such ownership.

2. Since the stricture of the Section 408(b) proviso runs only against a transaction "which would result in creating a monopoly or monopolies" and since any monopoly in this case was created by the CAB's issuance of a single certificate and not by the formation of the certificate holder (the transaction approved by the CAB under Section 408), there is no occasion to consider further whether the monopoly would bring about a restraint of competition, another element of the proviso. But in fact NCA's discussion of restraint of competition is wide of the mark and proceeds from its basic failure to understand that in air transportation competition may legally be restrained by the CAB in the exercise of its unquestionable power to limit entry. NCA confuses contests in CAB certification cases with competition in the market when it urges that participants in the Washington Airways consortium and others may have been dissuaded from participating in the CAB's certificate proceeding. It is only market competition with which the proviso to Section 408(b) is concerned; the level of such competition is not affected by the number of applicants for a certificate if the CAB is going to select only one of them. Moreover, the idea that there is a restraint of any sort because the fixed-wing carrier owners of Washington Airways removed themselves as individual applicants for helicopter certificates is fanciful. No fixed-wing carrier is now a helicopter certificate holder, and only three have ever been applicants for helicopter certificates. (See Pet. p. C-16.)

3. NCA asserts that "the decision below is inconsistent with the rationale underlying other court of

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appeals cases interpreting Section 408." (*Id.* p. 13.) The Court will recognize this statement as a petitioner's euphemism for "There is no conflict among the circuits." For there is of course no conflict. And there is no inconsistency of rationale. In each of the cases cited by NCA the Board had approved a transaction under Section 408, finding the anti-monopoly proviso no bar, and in each case the court of appeals sustained the Board. Two of the cases were decided by the court below, which has special expertness based upon its experience in aviation law, and the opinion in one of those two cases was written by a member of the panel below, *National Aviation Trades Ass'n* v. *CAB,* 420 F.2d 209 (D.C. Cir. 1969) (Tamm, J.). NCA attempted to invite what it sees as inconsistency to the attention of the court below by a petition for rehearing en banc, which was summarily denied.

Just wherein NCA believes the inconsistency lies is not at all clear. NCA says that in each of three cases it cites "the Court considered separately the question of whether or not approval under § 408 would create a monopoly and restrain competition." (Pet. pp. 15-16.) Then it offers "by contrast" a passage from the opinion below that indicates the passage quoted at the end of our statement of the case. (Pet. p. 16.) The "contrast" is elusive. In *Northwest Airlines* v. *CAB,* 303 F.2d 395, 401 (D.C. Cir. 1962), another of NCA's cases, the court said that "the merger in the matter at bar did not create or tend to create monopoly." In the opinion below the same court, in the passage quoted by NCA, found that no monopoly resulted from the Board's approval of the ownership and control of Washington Airways, or, to put it another way, that

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the equivalent in this case of the "merger" in *Northwest Airlines* "did not create or tend to create a monopoly."

Indeed, the opinion below follows precisely the course of decision suggested by Judge Friendly in *Butler Aviation Co.* v. *CAB,* 389 F.2d 517 (2d Cir. 1968), the third of NCA's cases. There Judge Friendly said that the mandate of the anti-monopoly proviso is "sharp, [but] its office is exceedingly limited . . . ." But he said that in its consideration of antitrust policies as they affect the public interest the CAB may not restrict itself to the proviso, and before approving a transaction not within the proviso and thus conferring antitrust immunity, the CAB must find "the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.'" *Id.* at 519. The court below, having found that the transaction at issue was not within the limited office of the proviso, went on to hold that the Board was justified in its conclusion "that any anti-competitive effects resulting from the control of Washington Airways by the carriers were insubstantial and speculative, and were outweighed by the advantages to be gained . . . ." (Pet. p. 16.)

NCA does not even attack in this Court the Board's public interest findings on the antitrust implications of the Washington Airways consortium, as summarized and approved by the Court of Appeals in the words just quoted. It limits itself to the claim that the anti-monopoly proviso should have been taken as a bar to approval without regard to the public interest. That position, as we have seen, is untenable.

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CONCLUSION

The petition should be denied.

Respectfully submitted,

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April 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1361

NATIONAL CAPITAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD AND WASHINGTON AIRWAYS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1–C18) is reported at 419 F. 2d 668. The opinion of the Board (Pet. App. B1–B42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1969. A petition for rehearing was denied on October 28, 1969. On January 14, 1970, the Chief Justice extended the time within which to file a petition for a writ of certiorari to March 27, 1970, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

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QUESTION PRESENTED

Whether the Board properly approved and certified a consortium formed by several major airlines to provide helicopter service in the Washington-Baltimore area.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958 (72 Stat. 737, as amended, 49 U.S.C. 1301, *et seq.*) are set forth in the Appendix to the petition (Pet. App. A1–A11).

STATEMENT

The Civil Aeronautics Board on August 29, 1966, ordered an investigation to determine the need for and feasibility of scheduled helicopter service, without federal subsidy, in the Washington-Baltimore area, and to determine which applicant, if any, should receive authorization to perform the service. Order E-24133. The order made all the trunk line and regional air carriers authorized to serve the three Washington and Baltimore airports parties to the investigation, and it directed that all applications to provide such service be filed within thirty days. Pursuant to this order, petitioner and ten other applicants, none of whom were certificated fixed-wing carriers or contemplated financial support by fixed-wing carriers, filed with the Board (Pet. App. C5). Subsequently, ten fixed-wing carriers serving the Washington-Baltimore area [1]—having been granted an extension of time

[1] The subsequent merger of Allegheny and Lake Central left nine fixed-wing carriers in the consortium (Pet. App. B31, n. 44).

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by the Board—filed an application on June 19, 1967, seeking a certificate of convenience and necessity for the jointly owned Washington Airways, Inc. ("WAI") (J.A. 93).[2] The application was accompanied by a request for Board approval, under Section 408 of the Federal Aviation Act, of the ownership agreement among the ten carriers; the airlines owned all the stock, subject to a limitation that no carrier contribute more than $500,000 in equity capital (Pet. App. B32). Since it was expected that WAI would incur operating losses for some time, the agreement provided the method of apportioning the losses, and it stipulated that WAI would seek a certificate to cease operations if its aggregate losses should exceed $8,000,000 or single-year losses should exceed $2,250,000 (*ibid.*).

The hearing examiner, after appraising both the need for the proposed service and the plans of the five remaining applicants,[3] found that helicopter service in the Washington-Baltimore area would be "a luxury service for a relatively few users" and would not be

[2] WAI's application was consolidated for hearing and disposition with the other applications under investigation (Pet. App. B31–32).

[3] Several of the applicants had by this time dropped out of the proceeding. Petitioner's suggestion that the formation of the airline consortium caused the withdrawal of two of the independent applicants (Pet. 6) is without support in the record. One of these applicants, Chesapeake & Potomac Airways, gave no reason for its withdrawal (J.A. 150). Capital Helicopter Airways and Chicago Helicopter Airways, which were jointly represented in the proceedings, said only that a review "of a number of recent developments", including the consolidation of WAI's application, dissuaded them from prosecuting their application (J.A. 151).

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self-supporting in the reasonably foreseeable future (J.A. 409, 395).[4] He therefore concluded that there was no need for the proposed service (Pet. App. B3).

The Board, reviewing the decision upon its own initiative, disagreed with the hearing examiner's conclusion; it found, after an examination of the record, that the public convenience and necessity do require the proposed service (Pet. App. B40). The Board agreed with the examiner, however, "* * * that substantial losses will occur in the immediate future from the operation of such services, and that such losses may continue for a substantial period of time" (Pet. App. B10). Accordingly, it held, and all the parties agreed, that the market justified the certification of only one applicant (Pet. App. B23). Because the cost of entry into helicopter service is high and because the recipient of the authority would have to be able to absorb substantial losses for some time, the Board considered that "the factor of financial strength is of paramount importance in our selection of a carrier * * *" (Pet. App. B23).[5] Analysis of the financial positions of the five applicants led it to the conclusion that WAI was clearly the strongest (Pet. App. B29). The Board therefore awarded a five-year

[4] None of the helicopter services which the Board has authorized (in Los Angeles, San Francisco, Chicago and New York) has been able to operate without heavy financial support either from the United States or from the fixed-wing carriers (J.A. 338–341).

[5] The Board found that to the extent there were any differences among the five applicants with regard to management, experience, and operating proposals, there was no superiority in these areas sufficient to warrant selection of a carrier which was less fit financially (Pet. App. B23–24).

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certificate to WAI and, subject to conditions to protect against anticompetitive effects,[6] approved the various control relationships under Sections 408, 409 and 412 of the Federal Aviation Act (Pet. App. B41). The Board specifically retained jurisdiction over WAI as a safeguard against any discriminatory practices (Pet. App. B36).

On review, the court of appeals unanimously affirmed (Pet. App. C1–C18).

ARGUMENT

The Board fully complied with applicable statutory requirements in certificating WAI. The court below properly upheld the Board's determination, and there is no reason for further review.

1. Petitioner erroneously complains that, by approving the creation of WAI under Section 408 of the Act, the Board approved a monopoly (Pet. 10–11). It is true that the Board under Section 401 certificated only one carrier for the Washington-Baltimore helicopter service; and thus the chosen carrier has a regulated monopoly.[7] But the Board found, and petitioner agreed, that the market could support only one carrier (Pet.

[6] The Board required that any carrier serving, or later authorized to serve, the Washington-Baltimore area be permitted of right to participate in the WAI consortium (Pet. App. B34–35). It noted with approval WAI's proposed "interval scheduling policy" by which the company would schedule flights at regular intervals rather than gear them to the arrivals and departures of particular fixed-wing flights (Pet. App. B34). The Board also authorized the continuance of scheduled and nonscheduled inter-airport air taxi operations which compete with the helicopter service (Pet. App. B8).

[7] The monopoly is regulated because the power to set prices and to control entry lies with the Board, not with the carrier.

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App. B23). Indeed, the Board has never certificated more than one helicopter service in any market, and the helicopter operations which it has certificated have never paid for themselves. Had petitioner—or any other applicant—prevailed before the Board, it would hold the same monopoly of which it now complains. Thus, refusal under Section 408 to approve the formation of WAI would not have avoided a monopoly in the hands of whichever applicant, if any, received Section 401 certification.

Petitioner's suggestion (Pet. 11) that the mere formation of the joint venture in itself constituted a forbidden monopoly is in error. The first proviso of Section 408(b) requires the Board to withhold its approval of any acquisition of control only if it "* * * would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party * * *" (49 U.S.C. 1378(b)). As this Court has pointed out, a monopoly is not an abstraction, but exists only in relation to some market. *Walker Process Equipment, Inc.* v. *Food Machinery Corp.*, 382 U.S. 172, 177–178; *United States* v. *du Pont & Co.*, 351 U.S. 377; see, also, *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (C.A. 2). The market here is helicopter service in the Washington-Baltimore area (Pet. App. C14). "Monopoly" here resulted not from the formation of the consortium in 1967 but from the Board's certification of WAI under Section 401; until the Board in 1968 authorized the service the consortium could not even enter the market.

Since the Board's approval of the formation of WAI in no way contravened the first proviso of Section 408(b), petitioner's argument is reduced to the contention that certification of this joint venture, rather than of an independent carrier, imposes restraints upon competition in violation of antitrust laws and policy. The "public interest" standard of Section 102 of the Act requires the Board to consider competitive factors in its decisions and to approve a transaction if "'* * * it finds the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.' *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 87." *Butler Aviation Company* v. *Civil Aeronautics Board,* 389 F. 2d 517, 519 (C.A. 2). The Board in this case did not neglect to consider possible anticompetitive effects, and its analysis is sound.

The Board concluded that the public convenience and necessity require this helicopter service. Since no helicopter service thus far instituted has been able to show a profit, the Board reasonably determined that the recipient of this certificate must be able to bear substantial losses for a substantial period of time (Pet. App. B10). The Board specifically found that, of all the applicants, only WAI, with its strong financial backing and ability to spread anticipated losses among its backers, could absorb the initial losses and still provide adequate service to the public (Pet. App. B29). Thus, certification of the WAI joint venture brings to the public the promise of service not other-

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wise available. See *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 170.[8]

Plainly the certification of WAI eliminates no actual competition in the relevant market; there is no dispute that one carrier, at most, can presently hope to succeed there. In the face of this, petitioner attempts to argue that the formation of the WAI joint venture eliminated potential competitors from the Washington-Baltimore helicopter market (Pet. 11-12). But the record here shows no such risk.

Petitioner's undocumented claim (Pet. 13) that several of the trunkline carriers are potential entrants into this type of helicopter market is unfounded. Nothing in the history of such services supports this contention. No fixed-wing carrier is presently providing helicopter service in any market, nor has any

[8] The traditional arguments as to why joint ventures may cause anticompetitive effects have relatively little force when applied to the present situation. For example, critics of joint ventures point out that there is a risk that the parents will extend their cooperation beyond the joint venture, or that they will stifle the subsidiary if it competes in markets which they serve. See Pitofsky, *Joint Ventures Under The Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 Harv. L. Rev. 1007, 1013–1014 (1969). Here, however, all the parents are subject to Board regulation, and the Board has retained jurisdiction to make sure that the parent carriers do not abuse their position (Pet. App. B36). Nor do the parents have any apparent incentive to stifle development of WAI, which will provide services which are not offered by the carriers and are usefully complementary to the carriers' city-to-city service. Moreover, where, as here, the agreement is to share anticipated losses in a new market, there is ordinarily far less anticompetitive danger than might result from agreements to use joint market power to divide anticipated profits. Cf. Turner, *The Scope Of Antitrust And Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1210 (1969).

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carrier fully prosecuted an application to provide helicopter service on an individual basis.[9] And even if one of the parent carriers would have competed for certification but for the formation of the consortium, the record conclusively shows that no carrier would have remained as a potential entrant after the Board had awarded a certificate. The market can sustain only one carrier, and its foreseeable prospect is for substantial losses. In short, this is a monopoly dictated by economic necessity; unless and until economic circumstances change materially, no carrier outside the market may fairly be characterized as a potential entrant.

While expecting a substantial period of unprofitability in this market, the Board nonetheless was alert to the benefits of competitive service when and if it should become feasible. It authorized the continued operations of air taxis in the Washington-Baltimore

[9] In 1948 United Airlines requested dismissal of its application before oral argument in the *Chicago Helicopter Service Case*, 9 C.A.B. 687. Allegheny Airlines filed an application in the earlier *Washington, D.C., Helicopter Service Case*, 38 C.A.B. 823, but the Board denied it with the other applications denied at that time. Petitioner points to the alleged interest of American Airlines in entering this market in the present case (Pet. 12). While it is true that American on February 17, 1967, filed for an amendment of its certificate to cover this helicopter service (J.A. 40), the request was clearly subsidiary to its much longer motion for extension of time which it filed the same day (J.A. 44). In this motion American asked a 30-day extension "so that it can canvass other carriers to see whether it would be possible to develop a jointly-held corporation to own and operate such services" (J.A. 45). American said it wished its application for certificate amendment to be consolidated into the proceeding only if the effort to develop a joint venture failed (J.A. 45).

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area after WAI starts to fly (Pet. App. B8), and it has retained jurisdiction with full authority to certificate a competing service whenever changed circumstances might so warrant (Pet. App. B36, n. 50).

2. There is no conflict among the circuits. The court below held that WAI's monopoly is the result not of the formation of this joint venture (or of Section 408 approval thereof), but of certification under Section 401 to serve a market which can support only one operator (Pet. App. C14–C15). In upholding the Board's decision, the court took its guidance from *Butler Aviation Company* v. *Civil Aeronautics Board,* 389 F. 2d 517 (C.A. 2), on which petitioner relies. In that case the court held that a transaction is not within the prohibition of the first proviso of Section 408 (b) unless it creates a monopoly and that monopoly restrains competition. *Id.* at 519. The opinion of the court below is fully consistent with *Butler,* for it held that the formation of WAI did not create the monopoly, which is attributable only to Section 401 certification in a one-carrier market, and that this joint venture therefore does not fall within the proviso's ban (Pet. App. C14–C15). In the two other cases cited by petitioner, *Northwest Airlines* v. *Civil Aeronautics Board,* 303 F. 2d 395 (C.A.D.C.), and *National Aviation Trades Association* v. *Civil Aeronautics Board,* No. 22,602 (C.A.D.C., decided October 2, 1969), the

court concluded, as here, that the transaction in question did not create a monopoly.[10]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1970.

[10] This is not to say that the court below otherwise neglected competitive factors in reviewing the Board's decision to certificate WAI. On the contrary, the court carefully examined the Board's appraisal under Section 102 of competitive factors, and upheld the Board's conclusion that the certification, as conditioned by the Board, would not injure competition (Pet. App. C15–C17).

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